92-1810

Supreme Court, U.S.
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No. _____

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1992

CREDITORS OF MICRO-TIME MANAGEMENT SYSTEMS, INC.,
Petitioners,

v.

ALLARD & FISH, P.C., a Michigan professional corporation; DAVID W. ALLARD, JR.; DEBORAH L. FISH, Jointly and Severally,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

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WHETHER TWO APPEALS SHOULD BE CONSOLIDATED WHEN BOTH APPEALS HAVE SEPARATE INTERESTS AT STAKE?

A. Creditors Have The Right To Bring a Malpractice Claim Against the Attorneys for the Trustee of a Debtor's Estate.

B. The Debtor's Claim for Malpractice Against the Attorneys for the Trustee is Separate and Distinct from the Creditors' Claim for Malpractice.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Now comes the Creditors of Micro-Time Management Systems, Inc., by and through their attorneys, the Law Offices of Lawrence J. Stockler & Associates, P.C., and pray that a Writ of Certiorari issue to review the Judgment of the Sixth Circuit Court of Appeals entered in the above cause on

January 12, 1993.

OPINIONS BELOW

The Opinion of the District Court for the Eastern District of Michigan is appended as Appendix A. The Opinion of the Sixth Circuit Court of Appeals is appended as Appendix B. The Opinion of the United States Bankruptcy Court for the Eastern District of Michigan is appended as Appendix C. The Order of the United States Court of Appeals Denying Motion for Reconsideration is appended as Appendix D.

STATEMENT OF JURISDICTION

The Judgment of the District Court for the Eastern District of Michigan was entered on September 30, 1991. The Judgment of the Sixth Circuit Court of Appeals was entered on January 12, 1993 with the issuance of mandate dated February 16, 1993. The Order Denying Petition for Rehearing was entered on February 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

1.The Fifth Amendment of the United States Constitution provides, in pertinent part that:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

2.The Seventh Amendment to the United States Constitution provides, in total:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact

tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

FEDERAL PROVISION INVOLVED

Petitioners rely on the following statutory provisions as cited, their pertinent text as set forth in the Appendix:

11 U.S.C. § 1123 -- contents of plan

11 U.S.C. § 1141 -- effect of confirmation

11 U.S.C. § 323(a) -- rule and capacity of trustee

11 U.S.C. § 327(a) -- employment of professional persons

STATEMENT OF THE CASE

This case was decided in the Court of the Appeals for the Sixth Circuit. The Court of Appeals rendered a written Opinion filed January 12, 1993, as well as unilaterally consolidating two appeals; case nos. 91-2260 and 91-2261 as one appeal, resulting in the denial of due process of law to the Creditors of Micro-Time Management Systems, Inc. (MTMS) by denying them the opportunity to perfect their own appeal as well as refusing them to maintain a malpractice claim against the attorneys for the trustee for MTMS.

On February 19, 1988, MTMS filed a Petition in Bankruptcy Court pursuant to Chapter 11 of the Bankruptcy Code. Comerica Bank, a creditor of MTMS, filed a motion for the appointment of a trustee for MTMS. In the Spring of 1988, attorney Arnold S. Schafer of Schafer & Weiner,

P.C., bankruptcy counsel for MTMS, contacted John C. Bohl, Jr. and informed Bohl that a trustee was being sought and inquired whether Bohl would be able to serve as trustee.

Although Bohl had a financial interest and connection with Comerica Bank, Bohl never advised attorney Schafer or any creditor of the conflict. Additionally, on May 24, 1988, Bohl filed an "Affidavit of Disinterested Person" which did not set forth any contemporaneous relationships with Comerica Bank, the alleged first secured creditor of MTMS. On that same date, Bohl was appointed trustee.

On June 28, 1988, an Order was entered appointing David Allard, Jr., of a predecessor firm as counsel for Bohl as trustee.

Otis Kirkland, president and sole shareholder of MTMS, (suspicious of

dealings between Bohl and Comerica Bank) on or about October 6, 1988, exposed Bohl's prior relationship with Comerica by a letter to Judge Steven Rhodes of the Bankruptcy Court for the Eastern District of Michigan. At an October 11, 1988 court hearing, Judge Rhodes disseminated the Kirkland letter to only those persons who were present; that being Comerica's counsel, the trustee's counsel Allard & Fish, and MTMS' counsel Schafer & Weiner. In his letter, Kirkland referred the Bankruptcy Court to Bohl's relationship with Comerica Bank (the alleged first secured creditor), and questioned Bohl's loyalty to the debtor's estate, MTMS, in light of that relationship as the Bank demanded and was eventually paid off as the first secured creditor without any objection by Bohl (the trustee) or his attorneys, Allard & Fish.

On February 1, 1989, with Bohl as trustee and Allard & Fish, P.C., substituted in as Bohl's attorneys, MTMS filed its Third Amended Disclosure and Third Amended Plan of Reorganization ("the Plan"). There was no mention whatsoever of potential causes of action against Comerica Bank or relating to Bohl's relationship with Comerica Bank or any alleged errors of omissions of Allard & Fish.

On June 23, 1989, the Bankruptcy Court, after a challenge by a member of the creditor's committee as to Bohl's fitness as trustee, issued a Memorandum Opinion and Order which denied Bohl's entire fee applications as trustee and his accounting firm's fees in total for accounting services, vacated the Orders appointing Bohl as trustee and disqualified Bohl and his accounting firm from any further involvement as trustee or accountant. The

Court found a potential, if not actual, conflict of interest with Comerica Bank, the alleged first secured party, which gave rise to an appearance of impropriety, and which should have been disclosed in Bohl's original "Affidavit of Disinterested Person."

In late August of 1989, MTMS and Kirkland, represented by the Law Offices of Lawrence J. Stockler & Associates, P.C., filed two causes of action in the United States Bankruptcy Court for the Eastern District of Michigan against Bohl's bonding company seeking damages resulting from Bohl's breach of fiduciary duty as trustee and against Bohl as accountant for the failure to disclose the Comerica Bank relationship with MTMS. In July of 1990, a jury returned a verdict against the Bonding Company and Bohl based on damages arising

from the Comerica Bank settlement and other matters.

After the filing of MTMS' claim against Bohl, but before the trial on the matter, MTMS filed a motion to modify the Plan on October 16, 1989. The Court entered its Order modifying the Plan on December 19, 1989. Still, there was no disclosure to the creditors of the alleged malpractice of Allard and Fish.

In May of 1990, Allard & Fish filed its second and final application for attorney fees. This application was objected to by Stockler, individually and as a member of the Creditors' Committee as well as by Kirkland and MTMS. On August 14, 1990, the Court considered the Allard & Fish fee application. The Court awarded Allard & Fish $25,000.00 out of a requested $66,381.19, finding the law firm violated:

> "...its' duties in not investigating the factual basis of the allegation and investigating the legal issues that resulted therefrom, and in not disclosing the results of its factual and legal investigations.
>
> The impact of this failure to disclose can only be characterized as substantial..." (Transcript, August 14, 1990, In Re MTMS, Case No. 88-01181-R, U.S. Bankruptcy Court, Eastern District of Michigan, p. 5, lines 11-16).

An action was commenced by the creditors, through Lawrence J. Stockler, as a creditor and a member of the Creditors' Committee, on or about January 7, 1991 against Allard & Fish in the United States Bankruptcy Court for the Eastern District of Michigan (which was removed to the United States District Court for the Eastern District of Michigan) as a result of the legal malpractice by Allard & Fish, P.C., David W. Allard, Jr. and Deborah L. Fish. MTMS and Otis Kirkland, asked to be included as plaintiffs in this lawsuit. Stockler, as a creditor, agreed, but made

it clear in the Complaint that was filed on January 8, 1991 that the damages of the creditors and the debtor were separate from one another. Specifically, the relief clause of the Complaint requests "that this court apportion such relief granted between the debtor and all of the creditors." Kirkland signed the Complaint twice, once as president of MTMS and once individually "and on behalf of all other creditors."

On or about April 3, 1991 the creditors' attorney Stockler moved to withdraw as to MTMS and Kirkland, only. The motion was granted by Judge LaPlata on May 23, 1991.

On September 30, 1991, Judge LaPlata entered an Order granting dismissal of the primary Complaint, premised on the theory that the "Order Confirming Plan of Reorganization" of MTMS entered by Judge Rhodes in the bankruptcy proceedings on May

4, 1989 was res judicata as to the Plaintiffs' claims as the Plan did not reserve any action against Allard & Fish.

It is the creditors' position that Judge LaPlata's Opinion and Order overlooks the fact that the creditors' claim against the defendants herein is independent of MTMS' claim and MTMS' Plan and does not and would not belong in MTMS' plan of reorganization. Specifically, the creditors' claim could not and was not provided in MTMS' Plan of Reorganization.

Throughout the pendency of this action, the defendants herein assert they did not owe a duty to MTMS or the creditors, but rather, only had a duty to the trustee. Judge LaPlata denied that assertion in his "Order Vacating Attorney Fee Award and Remanding Action to Bankruptcy Court," holding that the Allard & Fish defendants have a duty to the

creditors of MTMS separate and distinct from their duties to the trustee. Specifically, Judge LaPlata stated in his opinions of September 16, 1991, that:

> "...the Bankruptcy Trustee has a general fiduciary duty to all parties in interest in the bankruptcy case. This duty extends to the shareholders and the creditors [See, Commodity Futures Trading Commission v Weintraub, 105 S. Ct. 1986 (1985)]...[I]n the bankruptcy arena, counsel for the trustee is a fiduciary of the estate [See, In Re Consupak, Inc., 87 B.R. 529 (Bkrtcy. N.D. Ill. 1988)]..."

The Court of Appeals for the Sixth Circuit unilaterally consolidated two separately filed and independent appeals, being the creditors' claim against the defendants and MTMS' claim against the defendants. The Court of Appeals' opinion merging both appeals together denied the creditors a right to appeal (a denial of due process and equal protection of the law.)

The facts establish that the creditors of MTMS, as a matter of law, had their own attorney and their own standing to appeal, as a matter of right, the trial court's dismissal of the creditors' complaint. Specifically, even if arguendo the trial court ruled that MTMS and Kirkland had notice and knowledge of the facts of malpractice, that should have been included in the plan of reorganization, this did not dispose of the creditors of MTMS' claim because the creditors nor the creditors committee had any knowledge of either MTMS' Chapter 11 disclosure for reorganization or the plan of reorganization of the malpractice and wrongful actions of defendants.

REASONS FOR GRANTING THE WRIT

Petitioner, as a creditor of MTMS and on behalf of the Creditors' Committee of

MTMS, is seeking to have its legal malpractice claim against the law firm of Allard & Fish, P.C., David W. Allard, Jr. and Deborah L. Fish heard. The Court of Appeals for the Sixth Circuit's action of unilaterally consolidating two separate appeals had resulted in the denial of allowing the creditors of MTMS the opportunity to appeal, or maintain a malpractice claim against the attorneys for the trustee for MTMS. The creditors' claim against Allard & Fish, P.C. et al is independent of MTMS' claim and was never included in MTMS' Plan of Reorganization. Defendants Allard & Fish's duty to the creditors of MTMS was separate and distinct from their attorneys' duties to the trustee and that duty was violated by never notifying the creditors nor the Creditors' Committee of the conflict of interest between Bohl and Comerica Bank as well as

failing to advise Bohl of his obligation as trustee as was found by Bankruptcy Judge Rhodes.[1] The

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[1] "It's clear from the record that has been established in connection with these bankruptcy proceedings that Allard and Fish did essentially nothing in response to this allegation, say, perhaps, confirm that Mr. Bohl was currently under contract with Comerica Bank.

Allard Fish certainly made no disclosure of any investigation of these facts and certainly made no recommendation, either to Bohl or to the Court, as to what impact this would have upon Mr. Bohl's qualifications to serve as trustee, nor any disclosure of any other investigation.

If the Court concludes that the law firm, Allard and Fish, was under a substantial obligation when that allegation was made, at least to understand an investigation of the factual basis for the allegation, and then to investigate the legal consequences of the facts that it determined in its investigation.

The Court so concludes because the attorneys, Allard and Fish, were attorneys for Mr. Bohl but in his unique and special capacity as trustee, that is, representative of the estate and were, therefore, obligated to assure that the estate was managed, not only in the best interest of the creditors and other interested parties, but within the bounds of the law.

It's certainly not any kind of novel or unique or truer problems of law that a trustee, who has an ongoing relationship with a creditor, may be disqualified from serving as trustee and, therefore, it should have been plain and obvious to Allard and Fish that there was a serious matter requiring their immediate attention and investigation and recommendation.

If not recommendation, at least disclosure to the Court and other interested parties, so that an appropriate process could be undertaken.

The Court, therefore, concludes that Allard and Fish violated its' duties in not investigating the legal issues that resulted therefrom, and in

not disclosing the results of its factual and legal investigations.

The impact of this failure to disclose can only be characterized as substantial. It's quite likely, in the Court's view that if there had been a proper disclosure [at] that time, that Bohl would have been removed as trustee and replaced by a trustee unburdened by any conflicts of interest. It is, of course, difficult to predict how any such trustee would have conducted and managed the estate after that, except that we do know, that, as a result of this conflict of interest, a jury has determined that the Micro-Time estate was very substantially damaged.

* * *

Just as the Court has previously found a failure of duty on the part of Allard and Fish, in regard to the investigation and disclosure of Bohl's conflict of interest with Comerica, if occurs to the Court, and the Court concludes that this failure on the part of Allard and Fish to advise Mr. Bohl.

It's clear from the evidence presented to the Court and jury in the jury trial that Mr. Bohl's previous experience as a trustee in Chapter 11 cases was extremely limited and, as a result, his understanding of his duties and obligations as a trustee in a Chapter 11 cases was extremely limited and, as a result, his understanding of his duties and obligations as a trustee in a Chapter 11 case were extremely limited, that lack of knowledge of his duties as trustee manifested itself in numerous ways, most unfortunate ways, throughout his conduct of his trusteeship.

The Court believes that Allard and Fish had a duty to review with Mr. Bohl, in a concrete and real and substantial way, whatever his duties were as Chapter 11 trustee and yet it's clear, not only from the fee statement, but also from the conduct of Mr. Bohl, himself, that there was no such substantial understanding.

We can fault Mr. Bohl for not knowing exactly what was required of him. By definition, each trustee, in a Chapter 11 case, has that first case, in which he is appointed and in which he needs advise. Allard and Fish have had substantial experience, both as attorneys for trustees and, in Mr. Allard's case, as trustee, and, certainly, was

unsecured Creditors' Committee had no knowledge of the alleged conflict between Bohl and Comerica Bank until August 14, 1990, at the hearing on Allard & Fish's Petition for Fees before Bankruptcy Judge Steven W. Rhodes of

the United States Bankruptcy Court for the Eastern District of Michigan. It was at this hearing that the creditors of MTMS learned for the first time of Allard & Fish's knowledge of the trustee's conflict of interest with Comerica Bank. Since the creditors nor the Creditors' Committee had any knowledge in either the Chapter 11 disclosure or the Plan of Reorganization of the malpractice and wrongful actions of defendants, Petitioner, along with the

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in an excellent position to give Bohl the advise he needed, but it was not communicated." See Transcript; In Re Micro-Time Management Systems, Inc., Case No. 88-01181-R, United States Bankruptcy Court Eastern District of Michigan, August 14, 1990.

creditors, should not have been deprived of the right to maintain an action against Allard & Fish, P.C., et al for their legal malpractice and wrongful actions, nor deprived of their appeal. ALLARD & FISH, AS ATTORNEYS, RENDERED DETAILED LEGAL SERVICES FOR BOHL, THE TRUSTEE OF MTMS, IN PREPARATION OF MTMS' CHAPTER 11 DISCLOSURE, IN PREPARATION OF THE REORGANIZATION AS WELL AS THE PLAN OF REORGANIZATION, BILLED FOR SUCH SERVICES, AND KEPT SILENT THEIR WRONGDOINGS.

I.

TWO APPEALS SHOULD NOT BE CONSOLIDATED WHEN BOTH APPEALS HAVE SEPARATE INTERESTS AT STAKE.

Fed. R. App. P. 3(b) provides for joint or consolidated appeals. Specifically, the same provides that:

> "If two or more persons are entitled to appeal from a judgment or order of a district court and their interests

> are such as to make joinder practical, they may file a joint notice of appeal, or may join in an appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. . ."

In the case presently before this Court, a Notice of Taking Appeal was filed by Stockler, attorney for all creditors of MTMS other than Otis Kirkland.

As the Creditors of MTMS filed their own appeal through Stockler, MTMS and Otis Kirkland, by and through their attorney, Kenneth N. Graham (later replaced by Lynn Shecter), filed their own Notice of Taking Appeal.

It was obvious that Kirkland knew of the conflict between Bohl and Comerica Bank as clearly indicated by his October 6, 1988 letter to the Bankruptcy Court. However, this does not mean and in fact does not mean that Stockler nor any of the creditors of MTMS knew of the conflict between Bohl

and Comerica Bank. At that time, Stockler was not the attorney for Kirkland or MTMS nor did he receive a copy of the letter directed to Judge Rhodes, nor receive a copy of Judge Rhodes' letter to certain persons; to wit, Marion Mack (Asst. U.S. Trustee), Otis Kirkland, Jr., Arnold Schafer, John Bohl and Deborah Fish.

The unsecured Creditors' Committee HAD NO KNOWLEDGE of Allard & Fish's conflict between Bohl with Comerica Bank and the bankruptcy estate. It was not until August 14, 1990, at the hearing before Judge Steven W. Rhodes of the United States Bankruptcy Court for the Eastern District of Michigan, that the creditors of MTMS learned of Allard & Fish's involvement as to the trustee's conflict of interest with Comerica Bank, the alleged first secured creditor of estate assets.

Judge LaPlata's "Order Vacating Attorney Fee Award and Remanding Action to Bankruptcy Court," held that Allard & Fish had a duty to the creditors separate and distinct from their duties to the trustee.

This suit was brought on behalf of the creditors, with MTMS and Otis Kirkland joining in as an afterthought.[2]

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[2] Lawrence J. Stockler's Motion to Withdraw, and the Order granting that motion, concerns his representation of Otis Kirkland and MTMS, not the creditors. Moreover, the caption to this action shows that it is expressly brought on behalf of the creditors as well as the debtor. Lawrence J. Stockler only withdrew from representing MTMS and Kirkland individually. Also, the Order submitted with the Motion to Withdraw expressly states:

> "IT IS HEREBY FURTHER ORDERED that Lawrence J. Stockler shall continue to represent the Creditors of the Estate of Micro-Time Management Systems, Inc."

No objection was filed by the Allard & Fish defendants to that motion or to the submitted Order. Lawrence J. Stockler is a creditor, is a member of the Creditors' Committee, is the attorney that put the instant lawsuit together, that sent out notices to all of the creditors regarding representation in the Allard & Fish lawsuit, and has responses back from creditors. See, e.g., the response filed by the City of Southfield, indicating that Stockler may go ahead and sue the Allard & Fish defendants in their behalf, and the memorandum reflecting a similar to ahead from creditor Texas Stock Tab, Inc. The only creditor to object was Angela Sims, Otis Kirkland's close

Although Stockler was no longer Kirkland or MTMS' counsel, Stockler was still a member of the creditors of MTMS as detailed in Appeal no. 91-2260, as well as the attorney for the creditors of MTMS.

Moreover, pertaining to Stockler's Motion to Reopen the Bankruptcy Case on November 14, 1990, the motion was denied by the Bankruptcy Court because the Bankruptcy Court found that it was not necessary to reopen the case **SINCE THE CASE WAS NEVER CLOSED. THERE WAS NO FINDING WHATSOEVER THAT THE UNSECURED CREDITORS' COMMITTEE HAD NO STANDING TO PURSUE AN ACTION FOR**

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personal friend, who objected to being "Included as a named party in the lawsuit . . . on behalf of the Creditors of Micro-Time Management Systems, Inc." [Emphasis added.] An attorney who appears for a party in pending litigation is always presumed to have authority to do so until the contrary is shown. Drew v. Burley, 287 F. 916 (D.C. Or. 1920). There is a presumption that an attorney is authorized to appear and the burden rests on the party on whose purported behalf the attorney appeared to show to the satisfaction of the court the nonexistence of such authority. Aaron v. United States, 155 F. 833 (C.A. Mo. 1907).

LEGAL MALPRACTICE.[3]

When the motion to dismiss was filed by Allard and Fish, Stockler responded on behalf of the creditors by an answer and brief. Two separate appeals were filed from the District Court's Order Granting Defendants' Motion to Dismiss Primary Complaint by the Honorable George LaPlata, the first one by the creditors, the second by MTMS and Kirkland. Both appeals were separate as based upon two separate claims.

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[3] The Court: All right. I -- and, Mr. Stockler, before you begin in connection with the motion to reopen, I'd like for you to explain to me why you filed the motion to reopen a case that wasn't closed, and I'd like for someone to explain to me why they opposed a motion to reopen that wasn't closed. I've got two inches of paper here on a request to reopen a case that isn't closed. Would somebody tell me how that happened?

Mr. Stockler: Well, yes.

The Court: Did you presume it was closed?

Mr. Stockler: Yes.

The Court: You didn't investigate whether it was closed?

Mr. Stockler: Well, my reading is that it may be closed, it may be open, it may --

The Court: It's not closed." [See Transcript, In the Matter of MTMS, Case No. 88-01181-R; Excerpt of Proceeding: Motion to Reopen Case, December 17, 1990; pg. 3-4, lines 23-25; 1-13].

Appeal no. 91-2260 was the appeal pertaining to the creditors of MTMS, as previously stated and reiterated and stressed to this Court, which had no knowledge of the conflict between Bohl and Comerica Bank. Both appeals had separate attorneys.

A. Creditors have the Right to Bring a Malpractice Claim Against the Attorneys for the Trustee of a Debtor's Estate.

By statute as well as case law, the trustee's duty is to the estate, its creditors in particular. E.g., Commodity Fixtures Trading Commission v Weintraub, 105 S. Ct. 1986 (1985), In Re Obie Elie Wrecking Co., 35 B.R. 114 (N.D. Ohio, Bkrptcy., 1983); In Re Day Lumber Co., 8 F2d 146 (D.C. Wash. 1925); In Re 2001 Cincinnati, Inc. VIP Clubs, 43 B.R. 6 (S.D. Ohio, Bkrptcy., 1984); In Re Fidelity America Financial Corp., 43 B.R. 74 (E.D.

Pa., Bkrptcy., 1984); In Re Hughes Drilling Co., 75 B.R. 196 (W.D. Okla., Bkrptcy., 1987); Ragsdal v. New England Lands Development Corp., 250 Ga. 233; 297 S.E.2d 31 (1982), and other cases cited supra. The attorneys' duty was to assist the trustee in carrying out his duty, which is to the estate. Recognizing this duty would not create a conflict of interest. Here, the trustee did have a conflict of interest, and his attorneys, Allard & Fish, P.C. allowed themselves to become embroiled and caught up in that conflict, as Judge Rhodes held, by failing to review with Mr. Bohl as trustee, in a concrete and real and substantial way, his duties as a Chapter 11 trustee, and failure to investigate what the Court characterized as:

> "a serious matter requiring their immediate attention and investigation and recommendation, or, if not recommendation, at least disclosure to the Court and other interested

> parties, so that an appropriate process could be undertaken."

[Transcript of August 14, 1990; see also pp. 4, 7-8 and paragraph 5, sub-parts (a)-(b) inclusive, of the Complaint in the instant action.]

B. The Debtor's Claim for Malpractice Against the Attorneys for the Trustee is Separate and Distinct from the Creditors' Claim for Malpractice.

Judge LaPlata's "Order Vacating Attorney Fee Award and Remanding Action to Bankruptcy Court," held that the Allard & Fish defendants had a duty to the Creditors separate and distinct from their duties to the trustee. That Order states at pp. 5-8:

> "Unquestionably, the Bankruptcy Trustee has a general fiduciary duty to all parties in interest in the bankruptcy case. This duty extends to the shareholders AND THE CREDITORS . . . in the bankruptcy arena, counsel for the Trustee is a fiduciary of the estate [as well as] officers of the court . . . In the instant case, this Court finds that counsel for the Trustee has a duty to counsel the Trustee regarding resolution of the potential conflict of interest . . . the Bankruptcy Court concluded that

> Appellant woefully failed to advise the Trustee regarding both the conflict issue and his general duties."

[Opinion, September 16, 1991, pp. 5-8. Emphasis added.] Judge LaPlata also found that "an investigation was appropriate to ascertain the extent to which a conflict existed. It was at this time that Appellant was obligated to discuss the situation with its client and advise appropriately." Opinion, September 16, 1991, p. 6, ftnt. 11.

Judge LaPlata's holding that the attorneys for the trustee (Allard & Fish, P.C.) had a separate duty toward the creditors was undeniably correct.

11 U.S.C. § 323(a) states:

> "The trustee in a case under this title [11 U.S.C. §§ 101 et seq.] is the representative of the estate."[4]

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[4] The trustee acts as the representative of the estate, managing the estate's funds for the benefit of the creditors of the estate. In re Obie Elie Wrecking Co., 35 B.R. 114 (N.D. Ohio, Bkrptcy., 1983). See also In re Day Lumber Co., 8 F.2d 146

Although the trustee in bankruptcy stands in the shoes of the debtor, HE ACTS FOR THE BENEFIT AND PROTECTION OF THE CREDITORS; HIS RELATIONSHIP TO THE DEBTOR IS MORE TECHNICAL THAN REAL, WHILE HIS RELATIONSHIP TO THE CREDITORS IS MORE REAL THAN TECHNICAL. Ragsdal v. New England Land & Dev. Corp., 250 Ga. 233; 297 S.E.2d 31 (1982).

11 U.S.C. § 327(a) states in pertinent part:

(D.C. Wash. 1925) (trustee represents creditors, not bankrupt). The trustee in bankruptcy is the representative of the estate, and, as such, owes a fiduciary duty to the debtor and to the creditors to act fairly and to protect their interests, and may hire attorneys to help him carry out this duty. In re WHET, Inc., 750 F.2d 149 (1st Cir. 1984). The trustee is a fiduciary for the creditors. Accord, In re 2001 Cincinnati, Inc. VIP Clubs, 43 B.R. 6 (S.D. Ohio, Bkrptcy., 1984) (trustee is a fiduciary for the creditors), In re Grodel Mfg., Inc., 33 B.R. 693 (D.C. Conn., Bkrptcy., 1983) (trustee is a fiduciary of the estate), In re Air Lift Int'l, Inc., 92 B.R. 550 (D.C. Fla., Bkrptcy., 1988), In re Fidelity America Financial Corp., 43 B.R. 74 (E.D. Pa., Bkrptcy., 1984) (trustee acts as a representative of the estate, managing funds for the benefit of creditors), and In re Hughes Drilling Co., 75 B.R. 196 (W.D. Okla., Bkrptcy., 1987) (trustee is the representative of the estate)."

> "Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or ASSIST THE TRUSTEE IN CARRYING OUT THE TRUSTEE'S DUTIES UNDER THIS TITLE."

[Emphasis added.] Thus, the duty of the attorneys employed by the trustee is precisely that of the trustee: to represent the estate, and in particular, the creditors.

Like the trustee, an attorney employed to assist the trustee in carrying out the trustee's duties must be a "disinterested person" who does not hold or represent an interest adverse to the estate. 11 U.S.C. § 327(a). Contrary to the Allard defendants' assertion that they and the trustee owed no duty to the estate, but occupied a position adversarial to the interests of the estate -- which proposition is not supported by any

authority, and is contrary to the express terms of 11 U.S.C. §§ 323(a) and 327(a) -- an adversarial relationship with the debtor will disqualify a professional person from employment by the trustee. In re Greater Pottstown Community Church of Evangelical Congregational Church, 80 B.R. 706 (E.D. Pa. 1987). An attorney has an obligation to disclose conflicts of interest to the court. D.H. Overmeyer Co. v. Robson, 750 F.2d 31 (6th Cir. 1984).

The professional person's employment by the trustee must be in the best interests of the estate. In re Auto West, Inc., 43 B.R. 761 (D.C. Utah, Bkrptcy., 1984). The term "professional," as used in the Code, denotes someone who is to perform a specialized service of benefit to the estate. In re Interstate Restaurant Systems, Inc., 61 B.R. 945 (S.D. Fla., Bkrptcy., 1986).

Thus, Defendants' unsupported claim that they had no duty to the estate is contrary to the express language of the applicable Code sections, and to the case authority thereunder. Defendants' citations (in the court below) to cases holding that ordinarily an attorney in litigation does not owe a duty to the opposing party are inapposite since it is the nature of the role of the trustee and his attorneys that their interest cannot be adverse to those of the creditors, or they are not fit for duty. The creditors are not the opposing party, but were made so only because of the breach of duty by the trustee's attorneys. If in fact the interests of the trustee and the attorneys became adverse to those of the creditors, this was the result of a dereliction of duty, and not because the trustee's attorneys' duty was not to the creditors in

the first place. What the Defendants are suggesting is that they in effect entered into a conspiracy with the trustee to further the trustee's own personal interests at the expense of the estate. That appears to have been true in fact, but it was never the design of Congress in enacting the Bankruptcy Code that it should be so.

II.

DUE PROCESS OF LAW MANDATES THAT CREDITORS TO A BANKRUPTCY PROCEEDING ARE ENTITLED TO REPRESENTATION BY AN ATTORNEY OF THEIR OWN ON APPEAL.

The Fifth Amendment to the U.S. Constitution (Bill of Rights) provides that:

> "No person shall be . . . deprived of life, liberty, or property without due process of law."

The United States Code Annotated, Vol. Constitutional Amendment V, by West

Publishing Company, contains the following annotations at page 553:

> "This amendment forbids federal government from depriving any person of life, liberty or property without due process of law. Bloom v. State of Ill., Ill.1968, 88 S.Ct. 1477, 391 U.S. 194, 20 L.Ed.2d 522."

At page 526 of the United States Code Annotated, Vol. Constitutional Amendment V by West Publishing Company, it is stated as follows:

> "The right to petition the government for redress of grievances includes the right of access to the courts; that right is also subject to due process protection in that the opportunity must be at a meaningful time and in a meaningful manner. Matter of N.C. Trading, 1978, 586 F.2d 221, 66 CCPa. 11."

At pages 536 and 537 of the United States Code Annotated, Vol. Constitutional Amendment V, it is stated:

> "Fair play is the essence of 'due process.' Galvan v. Press, Cal.1954, 74 S.Ct. 737, 347 U.S. 522, 98 L.Ed. 911, rehearing denied 75 S.Ct. 17, 348 U.S. 852, 99 L.Ed. 671. See, also, Evans v. Wilkerson, C.A.Ill.1979, 605

F.2d 369; Honeywell, Inc. v. Metz Apparatewerke, C.A.Ill. 1975, 509 F.2d 1137; Garvey v. Freeman, C.A.Colo.1968, 397 F.2d 600; Cox v. Burke, C.A.Wis.1966, 361 F.3d 183, certiorari denied 87 S.Ct. 304, 385 U.S. 939, 17 L.Ed.2d 218; Pinedo v. U.S., C.A.Cal.1965, 347 F.2d 142, certiorari denied 86 S.Ct. 547, 382 U.S. 976, 15 L.Ed.2d 468; U.S. ex rel. Mishkin v. Thomas, D.C.N.Y. 1968, 282 F.Supp. 729; U.S. v. American Honda Motor Co., D.C.Ill.1967, 273 F.Supp. 810."

"Fundamental requirement of due process is opportunity to be heard at meaningful time and in meaningful manner. Mathews v. Eldridge, Va.1976, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed.2d 18. See, also, Orloff v. Cleland, C.A.Cal.1983, 708 F.2d 372."

Title 28, U.S.C. contains Federal Rules of Appellate Procedure. Specifically, Fed. R. App. P. 3 provides for the process of taking an appeal as of right as well as Fed. R. App. P. 4, which provides for the time period in which to perfect an appeal as of right.

After the trial court's granting of summary judgment, Petitioner, as a creditor and on behalf of the creditors, filed

notices, specified the parties, specified the issues, filed the creditors' appeal with designation of counsel of record, and paid all fees pursuant to Fed. R. App. P. 3(a), (c), (d) and (e). As to Fed. R. App. P. 10, Petitioner ordered the transcripts. As to Fed. R. App. P. 11,

> "After filing the notice of appeal the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record."

[Emphasis added.] This of course was done by Petitioner on behalf of the creditors. MTMS and Kirkland (co-plaintiffs) filed their own appeal through their own counsel.

Fed. R. App. P. 25 provides for filing and service of documents on appeal. Once again, this was done by the creditors making all of their own filings. MTMS, on its own appeal, did this (under belief and knowledge) as well.

Pursuant to Fed. R. App. P. 27, the creditors answered all of Appellees' motions directed to the creditors never receiving any brief, motions or the like from Allard & Fish concerning MTMS' appeal.

Pursuant to Fed. R. App. P. 28 and 31, all briefs were filed and served by the creditors (as well as according to the Sixth Circuit Local Rules) along with the Creditors' own Appendix pursuant to Fed. R. App. P. 30 (and per Sixth Circuit Local Rules). The Creditors never received copies of MTMS' appeal, appendix or responses thereto by Allard & Fish. Additionally, oral argument was held as allowed by Fed. R. App. P. 34.

The creditors are entitled to representation on appeal by this Petitioner, being Stockler. Additionally, the creditors' briefs as well as their own oral argument should have been treated

separately by the Court of Appeals for the Sixth Circuit to entitle the creditors to equal protection and due process of law. The Court of Appeals for the Sixth Circuit's ruling precluded the creditors from any representation whatsoever, ignored their brief and ignored them as if they didn't exist, when it is the Creditors which suffered several million dollars of damages due to Allard & Fish's malpractice. This is an obvious violation of due process of law as to the creditors. EACH JUDICIAL LEVEL (TRIAL AND APPEAL) IS A SEPARATE AND DISTINCT PROCESS WHEREBY ATTORNEY I MAY REPRESENT THE CLIENT AT THE TRIAL LEVEL AND ATTORNEY II MAY REPRESENT THAT SAME CLIENT AT THE APPELLATE LEVEL.

Lynn H. Shecter, an attorney, only represented Micro-Time Management Systems, Inc. and Otis Kirkland in their appeal in the Allard & Fish matter and did not

represent the creditors. Stockler, as a creditor, and a member of the Creditors' Committee, filled out the documents for appeal as well as appearance forms on behalf of the creditors, not Shecter. Further, Stockler filled out all documents for appeal regarding who will be doing oral argument on behalf of the creditors, not Shecter. Lynn Shecter is the attorney for Micro-Time and Otis Kirkland only, and not the creditors. Lynn Shecter never represented the creditors on appeal and even acknowledged this by letter which was ignored by the Court of Appeals. The Court of Appeals for the Sixth Circuit has violated the creditors' due process of law whereby the creditors were left without counsel, without remedy, and without an appeal.

III.

RES JUDICATA IS NOT APPLICABLE WHEN CREDITORS' MALPRACTICE CLAIM AGAINST ATTORNEYS FOR THE TRUSTEE IS NOT PROVIDED FOR IN A PLAN OF REORGANIZATION AND THE CREDITORS' CLAIM IS INDEPENDENT OF THE DEBTOR'S CLAIM.

The Chapter 11 Bankruptcy Plan of Reorganization to be confirmed is that of the Debtor. See In re Beef Petroleum Corp., 92 B.R. 741 (Bkrtcy. W.D. Mich. 1988). Any ambiguity in a reorganization plan should be construed in accord with applicable law and ambiguities resolved against those who drafted it. Greensfelder v. St. Louis Public Service Co., 114 F.2d 53 (C.A. 8th Cir.), cert den 311 U.S. 714, 85 L.Ed. 464, 61 S.Ct. 396 (1940). In this instance, Allard and Fish assisted in drafting the Plan and petitioned for fees for such preparation and were remunerated in part.

The creditors' of MTMS' claim against the Defendants herein is independent and distinct from MTMS' claim and accordingly

does not belong and was not part of MTMS' Plan of Reorganization. As 11 U.S.C. § 1121(a) and (b) provide, normally only the debtor may file a Plan of Reorganization. IN THIS CASE THE PLAN WAS FILED BY THE TRUSTEE UNDER 11 U.S.C. § 1121(C). PURSUANT TO 11 U.S.C. § 1123 (CONTENTS OF PLAN), THE ONLY CLAIMS TO BE SET FORTH IN THE PLAN ARE CLAIMS AGAINST THE DEBTOR'S ESTATE, AND CLAIMS OF THE ESTATE.

ANY CLAIMS THAT THE CREDITORS MAY HAVE AGAINST OTHER PARTIES, SUCH AS, IN THIS CASE, THE CREDITORS' CLAIMS AGAINST THE TRUSTEE'S ATTORNEYS, ALLARD & FISH, ET AL., ARE NOT TO BE INCLUDED IN THE PLAN. 11 U.S.C. § 1141 DOES NOT PROVIDE FOR THE DISCHARGE OF ANY CLAIMS OF THE CREDITORS AGAINST OTHERS BUT ONLY FOR CLAIMS AGAINST THE DEBTOR'S ESTATE.

In the Plan of Reorganization, there is no provision for inclusion of creditors'

claims against third parties such Appellants' claim against the Defendants herein. It was only MTMS that was filing a Plan of Reorganization, not the creditors. The creditors were not seeking to reorganize MTMS' business.

Accordingly, any claims that the creditors may have against other parties such as the trustee's attorneys, Allard & Fish, et al, were not to be included in the Plan. As 11 U.S.C. § 1141 provides, there is no discharge of any claims of the creditors against others, only for claims against the debtor's estate.

Additionally, Judge LaPlata's "Order Vacating Attorney Fee Award and Remanding Action to Bankruptcy Court," held that the Defendants, Allard & Fish, had a duty to the creditors separate and distinct from their duties to the trustee. As previously stated, Stockler only withdrew from

representing MTMS and Kirkland, individually. The Order submitted with the Motion to Withdraw expressly states that "It is hereby further ordered that Lawrence J. Stockler shall continue to represent the creditors of the state of Micro-Time Management Systems, Inc." No objections were ever filed by the Defendants, Allard & Fish, to that motion or to the submitted order. Stockler is a creditor, is a member of the Creditors' Committee and is the attorney for the Creditors' Committee handling this matter.

An attorney who appears for a party in pending litigation is always presumed to have authority to do so until the contrary is shown. See Drew v. Burley, 287 F. 916 (D.C. Or. 1920). There was a presumption that an attorney is authorized to appear and the burden rests on the party on whose purported behalf the attorney appeared to

show to the satisfaction of the court the non-existence of such authority. See Aaron v. United States, 155 F. 833 (C.A. Mo. 1907).

As previously stated and reiterated, the creditors' claim against these Defendants is entirely separate from that of Otis Kirkland and MTMS. The creditors' claim would have no business being included in MTMS' Plan of Reorganization. The result of the Court of Appeals for the Sixth Circuit consolidating both appeals and treating it as one appeal with attorney Shecter representing all (despite her disclaimer) resulted in the creditors' appeal from the lower court's Order of Dismissal being neutered. The fact that no claim of MTMS against Allard & Fish was included in the Plan of Reorganization does not have a res judicata affect against the creditors. Accordingly, the creditors'

claim against Allard & Fish should not have been dismissed nor ignored by the Court of Appeals.

RELIEF REQUESTED

The relief sought herein under the Petition for Writ of Certiorari should be granted by this Honorable Court and this matter should be ruled upon by this Court in holding that the unsecured creditors, pursuant to due process of law, are entitled to representation by their own attorney on their own appeal as well as maintain a malpractice claim against the attorneys for the trustee even when there are no provisions provided for in the Plan of Reorganization. In the alternative, this matter should be remanded to the United States District Court for the Eastern District of Michigan to reinstate Petitioners' Complaint.

Petitioners' Complaint.

Respectfully submitted,

LAW OFFICES OF LAWRENCE J. STOCKLER, P.C.

BY: Lawrence J. Stockler

LAWRENCE J. STOCKLER (P 21042)
Attorneys for Petitioners
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Dated:May 10, 1993

APPENDIX A

UNITED STATED DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: C.A. No. 91-CV-60025-AA

MICRO-TIME MANAGEMENT SYSTEMS, INC. Plata

HON. GEORGE La

Bankruptcy Court Adversary

Debtor, Proceeding

/ No. 88-01181-R

MICRO-TIME MANAGEMENT SYSTEMS, INC., et. al., individually and on behalf of all other creditors,

Plaintiffs,

vs.

ALLARD & FISH, P.C., et. al., jointly and severally,

Defendants.

and

ALLARD & FISH, P.C., et. al.,

Third-Party Plaintiffs,

vs

LAWRENCE J. STOCKLER and ASSOCIATES, P.C.,

et. al., jointly and severally,

Third-Party Defendants.

_____/

ORDER GRANTING DEFENDANTS MOTION TO DISMISS PRIMARY COMPLAINT

On January 8, 1991, Plaintiffs, Micro-Time Management Systems and Otis Kirkland, commenced this action against Allard and Fish, P.C., Deborah Fish and David Allard, in the United States Bankruptcy Court. Predicated on a stipulation for withdrawal of reference, the action was withdrawn to this Court. Plaintiffs allege in Court I, Breach of Contract; Court II, Third-Party Beneficiary; Count III, Negligence; Court IV, Malpractice; Court V, Breach of Fiduciary Relationship; Court VI, Fraudulent Concealment; and Court VII, Egregious Conduct. Generally, Plaintiffs contend that Defendants, as counsel for the bankruptcy trustee, John Bohl, failed to

investigate a potential conflict of interest between Bohl and the debtors major creditor Comerica and failed to properly advise the trustee regarding numerous matters relating to the bankruptcy estate. As a result of these breaches, Plaintiffs maintain that they have suffered great monetary damage.

The facts leading to this action are relatively undisputed. The record supports that Bohl was contacted by Arnold Schaefer, Chapter 11 counsel for the debtor, regarding possible appointment as Trustee for the bankrupt estate. Bohl disclosed to Schaefer that a prior relationship with Comerica, the debtor's largest secured creditor, existed. After discussing the Comerica connection, Bohl was advised by Schaefer that a conflict did not exist. Bohl filed a Declaration of Disinterestedness which did not disclose

the Comerica connection. Bohl was appointed Trustee. On June 29, 1988, after Bohl's appointment, Allard and Fish, P.C. was appointed counsel for the Trustee.

In a letter dated October 6, 1968, Otis Kirkland, sole shareholder of Micro-Time, exposed Bohl's prior relationship with Comerica. At an October 22, 1988, court hearing, Judge Rhodes disseminated the Kirkland letter to all counsel without comment. Additionally, Judge Rhodes sent the Kirkland letter to the United States Trustee for appropriate action.

It was not until February 23, 1989, that any action was taken to facilitate an investigation of the potential conflict. At a hearing, Judge Rhodes ordered the Trustee to disclose his connection to Comerica in the form of an affidavit. On March 6, 1989, the Trustee filed his affidavit explaining his involvement with

Comerica. In June of 1989, Judge Rhodes entered an order of disqualification which stated that Bohl's Comerica connection constituted a "potential, if no actual, conflict of interest". From the time Kirkland raised the issue of a potential conflict of interest to the date the order of disqualification was entered, the Bankruptcy Court, without further investigation, approved a settlement of the litigation between Kirkland and Comerica, entered an order approving the debtor's third amended disclosure statement and entered an order confirming the plan of reorganization.

In its pending motion, defendants seek dismissal or summary judgment maintaining initially, that the principles of res judicata bar litigation of the issues raised or that could have been raised in the confirmation proceedings.

Specifically, defendants contend that the May 4, 1989, Order Confirming Plan of Reorganization entered by Judge Rhodes, serves as a final adjudication on the merits of the bankruptcy proceeding. Because the issues raised in Plaintiffs' Complaint could have been raised in the confirmation proceeding, defendants assert that the issues are now barred.

Under res judicata, also known as claim preclusion, a final judgment on the merits bars a later action by the same parties on the same causes of action, including claims which could have been but were not litigated.[1] It is well settled that an order confirming a plan of

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[1] Consol. TV Cable v. City of Frankfort, 857 F2d 354 (6th Cir. 1988).

reorganization is a final judgment for res judicata purposes.[2]

There is no question that Plaintiffs were aware of a conflict of interest potentially preventing Bohl from impartially fulfilling his duties as trustee. In fact, as previously stated, it was the letter executed by Otis Kirkland on October 6, 1988 that initially raised the conflict issue. Notwithstanding the accusations contained in his letter, Kirkland affixed his signature to the settlement without any further action on the conflict issue.

Plaintiffs contend that although they may have been aware that a potential conflict existed, they were not aware of the specifics and thus were unable to

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[2] See, Stoll v. Gottlieb, 305 U.S. 165 (1938) and In re Chattanooga Wholesale Antiques, Inc. v. Roseville Bank, 930 F.2d 458, 463 (6th Cir. 1991).

ascertain whether a cause of action predicated on the conflict existed. Although little is clear regarding this record, it is clear that Bohl filed an affidavit of full disclosure regarding his relationship with Comerica two months prior to the entry of the order confirming the plan of reorganization and over nine months prior the entry of order modifying the plan. It is also undisputed that Plaintiffs had proper notice of the hearing to confirm the plan and subsequently the hearing to modify the plan.

Plaintiffs categorically state that although they were aware of the potential conflict and the contents of the Bohl affidavit, it was necessary before a claim could be lodged to ascertain the extent to which the estate was harmed by the conflict and thus, the alleged failure to defendants to advise or take proper action. After the

one million dollar jury verdict against Bohl was pronounced, the plaintiffs contend they were then postured to lodge a claim.

First, the Court must initially note that the one million dollar jury verdict against Bohl has been set aside by the Bankruptcy Court. Regardless of this event, a cause of action for legal malpractice, which essentially is at the gravamen of plaintiffs' complaint, arises when on is aware of possible malpractice.[3] It is not necessary that a plaintiff be notified of the full extent of the damages in order for his cause to accrue.[4]

It may be true that plaintiffs did not know the extent of damage the potential

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3 See, Seebacher v. Fitzgerald, 449 N.W.2d 673 (Mich. App. 1989). Although plaintiffs' claim is also couched as a breach of contract to render competent legal services, the type of interest harmed is that arising from a legal malpractice claim.

4 See, Sherrell v. Bugaski, 425 N.W.2d 707 (1988).

malpractice caused, however, they admittedly were aware and the record supports that the conflict existed and that defendants may have not properly counseled the trustee. Noting that the claims could have been raised in the bankruptcy proceeding, the court finds the claims to be barred by the doctrine of res judicata. Accordingly, defendants' motion to dismiss is GRANTED.

/S/
George La Plata
U.S. District Judge

September 30, 1991
Ann Arbor, MI

APPENDIX B

91-2260/91-2261

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: MICRO-TIME MANAGEMENT SYSTEMS, INC.,

Debtor.

MICRO-TIME MANAGEMENT SYSTEMS, INC.; OTIS KIRKLAND, Individually and on behalf of all other Creditors, (91-2261).

Plaintiffs-Appellants,

and

CREDITORS OF MICRO-TIME MANAGEMENT SYSTEMS, INC., (91-2260),

Plaintiffs-Appellants,

v.

ALLARD & FISH, P.C.; DAVID W.ALLARD, JR.; and DEBORAH L. FISH, Jointly and Severally,

Defendants-Appellees.

ALLARD & FISH, P.C.; DAVID W. ALLARD, JR.; and DEBORAH L. FISH,

Third-Party Plaintiffs,

FILED:
January 12,1993
Leonard Green
Clerk

91-60025
AA/LaPlata

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

v.

LAWRENCE J. STOCKLER AND ASSOCIATES, P.C.; LAWRENCE J. STOCKLER, Jointly and Severally; SCHAFER & WEINER, P.C.; ARNOLD S. SCHAFER, Individually, Jointly and Severally,

Third-Party Defendants.

BEFORE: JONES and SILER, Circuit Judges; and PECK, Senior Circuit Judge.

PER CURIAM. Micro-Time Management Systems, Inc. ("MTMS", "Debtor"), Otis Kirkland, individually and on behalf of all other creditors, and "Creditors of MTMS" (hereinafter collectively referred to as "Plaintiffs") appeal an order dismissing, under the doctrine of res judicata, their complaint alleging that Allard & Fish, P.C., David Allard, Jr., and Deborah Fish (hereinafter collectively referred to as "Allard & Fish"), counsel for MTMS' trustee in bankruptcy, committed malfeasance by failing to investigate a potential conflict

of interest on the part of the trustee.[1]

For the reasons stated herein, we affirm.

I.

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[1]In 1991, Lawrence Stockler, as counsel for MTMS, filed an action (presently No. 91-2261) in bankruptcy court on behalf of MTMS and Kirkland, acting in his individual capacity and on behalf of all other creditors who would seek to participate in this action, against Allard & Fish. The case was referred to the district court where Allard & Fish moved to dismiss. Allard & Fish also filed a third-party complaint against Stockler, thus making him a party to the proceedings. Stockler then moved to withdraw as counsel for MTMS and Kirkland. Stockler did not specify at that time whether he was moving to withdraw as counsel for Kirkland in Kirkland's individual or representative capacity, however. The district court granted Stockler's motion to withdraw; however, it did not limit the withdrawal of Stockler to just MTMS and Kirkland in his individual capacity. After MTMS and Kirkland obtained substitute counsel who purported or represent MTMS and Kirkland, in his individual and representative capacities, the district court dismissed the case on the basis or res judicata.

MTMS and Kirkland have appealed the district court's decision. Stockler, believing that he withdrew from representing Kirkland in his individual capacity only, filed an appeal (presently No. 91-2260) on behalf of the other creditors. We find that when Stockler withdrew from the representations of Kirkland, he did not limit his withdrawal to just the representation of Kirkland in his individual capacity. In the absence of that limitation, Stockler's withdrawal from the representation of Kirkland included withdrawal from both Kirkland's individual and representative capacities. Therefore, we find that Stockler is no long representing any Plaintiff or Appellant in the case. We have decided to consolidate Stockler's "appeal" in No. 91-2260 with No. 91-2261.

On February 19, 1988, MTMS filed its petition in bankruptcy court pursuant to Chapter 11 of the Bankruptcy Code. Motions for the appointment of a trustee for MTMS were filed by Comerica Bank ("Comerica"), a major secured creditor of MTMS, and by Roaring Springs Blank Book Company ("Roaring Springs"), the chair of the Unsecured Creditors Committee. In late April or early May, 1988, Arnold S. Schafer of Schafer & Weiner, P.C., bankruptcy counsel for MTMS, contact John C. Bohl, Jr., and informed him that a trustee was being sought and inquired whether Bohl would be able to serve as trustee.

In May, 1988, Schafer again contacted Bohl. Bohl acknowledged his interest but advised Schafer that he, as a general partner of RGB Associates, had provided consulting services to Comerica on a totally unrelated foreclosure matter which

was winding down. Schafer told Bohl that the relationship did not represent a conflict of interest.

On May 20, 1988, Bohl met Kirkland, the owner of MTMS, and representatives of Comerica and Roaring Springs. As a result of this meeting, the parties stipulated to the court's appointment of Bohl as trustee.

On May 24, 1988, prior to his retention of counsel, Bohl filed an "Affidavit of Disinterested Person" which did not set out any contemporaneous relationships with Comerica Bank. On that same date, Bohl was appointed trustee.

On June 29, 1988, an order was entered appointing David Allard, Jr., as counsel for the trustee. Bohl states that he did not discuss the issue of the alleged conflict with Comerica with Allard or with Deborah Fish, who at that time was an associate attorney in Allard's office

working on the case. The Plaintiffs contend that is not true because the order authorizing the appointment of Allard as counsel states that Allard was to inquire into a Comerica claim on behalf of the estate.

In a letter to the bankruptcy court dated October 6, 1988, Kirkland sought to bring Bohl's alleged conflict of interest to the bankruptcy court's attention because Kirkland was suspicious of dealings between the Bohl and Comerica. In his letter, Kirkland referred the court to Bohl's relationship with Comerica, and questioned Bohl's loyalty to the Debtor's estate in light of that relationship.

On October 11, 1933, the court sent a letter to Kirkland and a separate letter to Marion Mack, the Assistant U.S. Trustee. In the letter, the judge instructed that the matter should be handled by the U.S.

Trustee because he is responsible for overseeing trustees. Also on October 11, 1988, at a hearing in the Debtor's case, the court handed out copies of the Kirkland letter and the court's response to all parties

Meanwhile, with MTMS', Kirkland's, Schafer's, the bankruptcy court's, the U.S. Trustee's, and the Unsecured Creditors Committee's knowledge of the alleged conflict, the bankruptcy proceedings continued to the apparent satisfaction of all interested parties. For example, on October 18, 1988, Comerica and MTMS reached a settlement which Kirkland approved. Schafer approved this settlement agreement. This agreement was then noticed for hearing before the Court and no objections were filed by any interested party. On November 10, 1988, an order approving the settlement with Comerica was entered.

On February 1, 1989, with Bohl as trustee and Allard & Fish as its attorneys, MTMS filed its Third Amended Disclosure and Third Amended Plan of Reorganization ("plan"). There was no explicit mention of potential causes of action relating to Bohl's relationship with Comerica or any alleged errors of omissions of Allard & Fish. At a hearing held on that date, the bankruptcy court ordered Bohl to disclose his connection to Comerica in the form of an affidavit, which he did on March 6, 1989.

Bohl also petitioned for fees on February 1, 1989. Objections were filed by attorney Lawrence Stockler on behalf of MTMS. At a hearing held on April 4, 1989, the question of Bohl's fees was taken under advisement.

On April 18, 1989, a hearing was held on confirmation of the plan and the voting

was reported. The plan was confirmed by a confirmation order on May 4, 1989.

On June 23, 1989, the bankruptcy court issued a memorandum opinion and order which denied Bohl's fee applications in their entirety, vacated the orders appointing Bohl as trustee, and disqualified Bohl and his accounting firm from any further involvement as trustee or accountant. The court found a potential, if not actual conflict of interest, which gave rise to an appearance of impropriety, and which should have been disclosed in Bohl's original "Affidavit of Disinterested Person."

In late August, 1989, MTMS and Kirkland, represented by Stockler, filed two causes of action against Bohl seeking damages resulting from Bohl's alleged breach of fiduciary duty as trustee and accountant in the alleged failure to disclose the Comerica relationship. In

July 1990, a jury returned a verdict against Bohl based on damages arising from the Comerica settlement and the sale of the Devonshire property (a property disposed of in the plan). The jury verdict against Bohl was vacated by the bankruptcy court in its July 26, 1991 order because of newly discovered evidence, pursuant to Rule 60 of the Federal Rules of Civil Procedure.

After the filing of the MTMS claim against Bohl, but before the trial on the matter, MTMS filed a motion to modify the plan on October 16, 1989. The court entered its order modifying the plan on December 19, 1989.

In May 1990, Allard & Fish filed its second and final application for attorney fees. This application was objected to by Stockler, Kirkland, and MTMS. On August 14, 1990, after the jury verdict in the Bohl case, the court considered the Allard

& Fish fee application. The court awarded Allard & Fish $25,000.00 out of a requested &66,381.19.

On November 14, 1990, Stockler filed a motion to reopen the case. The motion requested that the Unsecured Creditors Committee be allowed to pursue causes of action against Allard & Fish for alleged legal malpractice based on its representation of Bohl as the MTMS trustee. That motion was denied by the bankruptcy court.

On January 8, 1991, this action against Allard & Fish was filed by MTMS and Kirkland, in his individual capacity and on behalf of all other creditors. Stockler was counsel for MTMS and Kirkland. Among numerous other allegations, the complaint alleged legal malpractice by Allard & Fish based on alleged errors and omissions in its representations of Bohl. The action

was removed to the district court. Pursuant to the Federal Rules of Civil Procedure, Allard & Fish moved to dismiss the case under Rule 12(b)(6) or for summary judgment under Rule 56. On September 30, 1991, the district court dismissed the lawsuit against Allard & Fish. The basis of the district court's ruling was that the May 4, 1989 order confirming the plan barred the present action under the doctrine of res judicata. From this order, the Plaintiffs appeal.

II.

The Plaintiffs argue that their present action is not barred by the principles of res judicata. The argue that the alleged cause of action against Allard & Fish could not have been brought prior to the entry of the confirmation order because they were not aware of the extent or depth of Bohl's conflict of interest until the

jury returned a verdict in the Bohl litigation and therein set forth a specific dollar amount of damages.

Allard & Fish contend that Plaintiffs' potential alleged cause of action against Allard & Fish was in place prior to the date of the entry of the confirmation order. Because the claims were not asserted, Allard & Fish contends that the claims are barred by the principle of res judicata.

A district court's dismissal of a case on res judicata grounds is reviewed de novo by this court. Sanders Confectionery Products, Inc. v. Heller Fin., Inc., 973 F.2d 474, 480 (6th Cir.) (citing Gargallo v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 918 F.2d 658, 660 (5th Cir. 1990)), petition for cert. filed, 61 U.S.L.W. 3403 (U.S. Nov. 16, 1992) (No. 92-853).

The doctrine of res judicata, also called claim preclusion, means a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in that action. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). Res judicata has four elements: 1) a final decision was rendered on the merits in the first action by a court of competent jurisdiction; 2) the second action involved the same parties, or their privies, as the first; 3) the second action raises an issue actually litigated or which should have been litigated in the first action; and 4) there is an identity of the causes of action. Saunders Confectionery, 973 F.2d at 480.

A.

In the bankruptcy context, an order confirming a plan of reorganization

constitutes a judgment and a final adjudication on the merits of a bankruptcy proceeding. Id. (citing Stoll v. Gottlieb, 305 U.S. 165, 169-171 (1938); In re Chattanooga Wholesale Antiques, Inc., 930 F.2d 458, 463 (6th Cir. 1991); 11 U.S.C. § 1141(a) (1988) (outlining preclusive effect of confirmed plan)). An order confirming a plan of reorganization bars litigation of the claims raised in the bankruptcy proceedings or the confirmation proceedings not expressly reserved in the plan of reorganization or the order confirming the plan of reorganization. See id.; see also Sure-Snap Corp. v. State Street Bank & Trust Co., 948 F.2d 869, 872-73 (2d Cir. 1991).

In this case, the bankruptcy judge entered the order confirming the plan after giving full notice and an opportunity to be heard to all interested parties. This

order was approved by the Plaintiffs, and was not appealed. Furthermore, in a subsequent motion to modify the plan, the Plaintiffs again did not seek to preserve any claim against Allard & Fish. The plan and its later modification did not reserve any right of a claim against Allard & Fish even though the Plaintiffs knew that there was a cause of action against Allard & Fish before the plan was confirmed and before they requested a modification of the plan. Therefore, the order confirming the plan acts as a final judgment.

B.

Courts have held in the context of bankruptcy matters that not only formally named parties, but all participants in the bankruptcy proceedings are barred by res judicata from asserting matters they could have raised in the bankruptcy proceedings. See Met-L-Wood Corp. v. Pipin, 861 F.2d

1012, 1016 (7th Cir. 1988), cert. denied, 490 U.S. 1006 (1989).

In particular, the res judicata effect of the order confirming the plan bars claims by creditors that could have been brought within the context of the confirmation proceedings. Saunders Confectionery, 973 F.2d at 480-81; In re Justice Oakes II, Ltd,, 898 F.2d 1544, 1551 (11th Cir.), cert. denied, 111 S. Ct. 387 (1990). In addition, a trustee is considered a party to a confirmation proceeding. Sanders Confectionery, 973 F.2d at 481.

In this case, MTMS, Kirkland, any creditors of MTMS, and Allard & Fish would all be considered participants in the bankruptcy proceedings. MTMS, as the Debtor, was a party to the bankruptcy proceeding. Kirkland, as owner of MTMS and as a creditor, was a party to the

proceeding. Id. Similarly, any other "creditors" are parties to the proceeding. Id. Allard & Fish would also be party to the proceedings or, at least, privy to parties of the proceeding. Cf. id. (trustee is party to a proceeding); In re El San Juan Hotel Corp., 841 F.2d 6, 10 (1st Cir. 1988) (Under doctrine of nonmutual claim preclusion, an attorney for a former trustee of chapter 11 estate could use a prior action brought against the former trustee for willful beach of duties to estate as a defense to a later suit against that attorney even though attorney was not party to initial suit. Nonmutual claim preclusion deals with whether a party not involved in the earlier action may deflect a second lawsuit because he should have been, but was not, included in the earlier suit. What makes this nonmutual is that a plaintiff cannot rely on the earlier

action as an estoppel against the attorney.); see also Met-L-Wood, 861 F.2d at 1018 (the trustees' fraud claim against a collection of defendants, including the debtor's law firm was barred by the confirmation order).

C.

The third element of res judicata prohibits parties from bringing claims they have already brought or should have brought. The Plaintiffs argue that they could not have brought this action until the plan was confirmed and the estate had returned to MTMS because it is a claim against the trustee's lawyers. An action against a bankruptcy trustee's lawyers for the trustee's administration of the bankruptcy estate is a claim which should have been litigated before the plan was confirmed. See El San Juan Hotel, 841 F.2d at 10-11 (suit against trustee's attorney

is barred by prior suit against trustee, especially since same or similar claims are in both); cf. Saunders Confectionery, 973 F.2d at 481 (suit against trustee based on the administration of bankruptcy estate would be barred by confirmation plan).

That Plaintiffs also argue that the alleged cause of action against Allard & Fish could not have been brought prior to the entry of the confirmation order because they were not aware of the extent or depth of Bohl's conflict of interest until the jury returned a verdict in the Bohl litigation and therein set forth a specific dollar amount of damages.

A cause of action for legal malpractice, which essential is the gravamen of Plaintiffs; Complaint, arises when one is aware of possible malpractice. See Seebacher v. Fitzgerald, Hodgman, Cawthorne & King, P.C., 449 N.W.2d 673,

675-76 (Mich. App. 1989). It is not necessary that a plaintiff be notified of the full extent of the damages in order for his cause to accrue. Id. Therefore, this contention is without merit.

D.

As to the identity of causes of action, that determination is made by considering whether the claims arose out of the same transaction or series of transactions, or whether the claims arose out of the same core of operative facts. See Justice Oakes II, 898 F.2d at 1551-52.

In this case, the central issue of the bankruptcy proceedings was the determination and distribution of the MTMS estate and an attempt to reorganize MTMS. The essence of the complaint was that Allard & Fish did not take appropriate action with respect to an alleged conflict of interest and that a settlement was

consummated in the Comerica claim which was more beneficial to Comerica than it would otherwise have been had the conflict not existed. The Plaintiffs' claims against Allard & Fish's representation of Bohl in the bankruptcy proceedings. As a result, we find that the alleged claims against Allard & Fish are integrally related to the subject matter of the bankruptcy proceeding and arise out of the same transaction or series of transactions and the same core of operative facts as the bankruptcy proceedings.

III.

Notwithstanding that the confirmed plan would bar this litigation, the Plaintiffs contend that they reserved the right to sue Allard & Fish in the confirmed plan. The Plaintiffs rely on the following language in the confirmed plan of reorganization: "all causes of action which

the debtor may choose to institute shall be vested with the debtor." J.A. at 297 (No. 91-2261). While this language allows MTMS to institute suits, any suit that it institutes would be subject to defenses such as lack of jurisdiction, the statute of limitations, or in this case, the doctrine of res judicata. For example, while MTMS may bring a suit against Allard & Fish, that suit can be dismissed on res judicata grounds if that suit should have been brought in a prior action. As a result, the language that the Plaintiffs rely on is not helpful if their action is otherwise barred on res judicata grounds.

Along the same lines, the Plaintiffs argue that , pursuant to 11 U.S.C. § 1141(b)(1988), they could institute this cause of action against the Trustee's lawyers after the plan was confirmed. Section 1141(b) provides that: "Except

as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." The Plaintiffs argue that a cause of action against a third party is a property or interest of the bankruptcy estate. They argue that upon confirmation of the plan on May 4, 1989, the cause of action against Allard & Fish accrued to MTMS.

This argument fails because it erroneously assumes that MTMS had preserved this lawsuit against Allard & Fish before the plan was confirmed. MTMS had not expressly reserved any such suit. Therefore, any cause of action that may have existed was extinguished upon the plan being confirmed and not appealed or modified to reserve a right to sue Allard & Fish. Therefore, this statute does not help the Plaintiffs in this case.

The Plaintiffs also argue that Allard & Fish should not be allowed to commit wrongful deeds in promulgating a plan for reorganization and then be shielded from those wrongful deeds by the confirmation of that plan. While this proposition might otherwise be appealing, the Plaintiffs knew about the wrongdoing prior to the confirmation of the plan in this case. Therefore, we find the Plaintiffs' public policy argument unpersuasive.

IV.

We find that the Plaintiffs' claims are barred by the doctrine of res judicata. Therefore, the district court's judgment is **AFFIRMED**.

91-2260
ISSUED AS MANDATE: February 16, 1993
COSTS: NONE
FILING FEE .....$
PRINTING .....$
TOTAL .....$

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BANKRUPTCY COURT

IN RE:

MICRO-TIME MANAGEMENT SYSTEMS, INC., Case No. 88-01181-R

Debtor.

Chapter 11

MEMORANDUM OPINION AND ORDER

I.

John C. Bohl, Jr. was appointed Chapter 11 operating trustee of Micro-Time Management Systems, Inc. ("Micro-Time") on June 2, 1988. Parker, Bohl & Associates, an accounting firm in which Bohl is a partner, was appointed accountants for the trustee on July 12, 1988. The accountants for the trustee and the trustee subsequently filed first interim applications for fees. The United States Trustee and Lawrence J. Stockler, a creditor of the debtor, filed objections to

both applications. Several hearings have been held on these objections and the only remaining objection to be resolved concerns an alleged conflict of interest regarding Bohl's relationship with Comerica Bank ("Comerica"), a major creditor of the debtor. This opinion resolves this final objection.

II. Facts

Bohl's first involvement with the Micro-Time case occurred when he was contacted in late April or early May 1988 by Arnold Schafer, the debtor's attorney. At that time, Schafer informed Bohl of the basic circcumstances of the case, including the fact that Micro-Time was involved in litigation with Comerica in numerous venues. Schafer indicated that an outside party, such as an expert witness or

operating trustee, might provide a stabilizing influence in the case.

Schafer contacted Bohl again in mid-May 1988 and requested his services as an operating trustee for Micro-Time. During this conversation Bohl informed Schafer of two facts which he thought might present a conflict of interest. First, a staff accountant of Parker, Bohl & Associates had performed accounting work for Micro-Time while employed bv another accounting firm.

Secondly, and more significantly, Bohl, as a general partner in RGB Management Services, was working as a consultant to Comerica in a foreclosure case involving Computer Alliance Corporation ("Computer Alliance"). According to an affidavit submitted by Bohl in response to the objections to his fee applications, the services provided to Comerica by RGB Management Services

included "a valuation of service contracts, liquidation of an out-of-state branch office, negotiations with the IRS regarding an out-of-state branch which owed back taxes, examination and review of the foreclosed comoany's records, recommendations regarding foreclosure and the preparation for litigation support in Comerica's lawsuit against the foreclosed company's former accountants." Bohl told Schafer that the Computer Alliance case was "winding down and was almost over. Bohl states in his affidavit that the consulting work on the Computer Alliance case began in late March, 1986 and that more than 92% of the work performed by RGB Management Services was completed by May 24, 1988.[1]

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[1] Between May 24, 1988 and December, 1988, RGB Management Services spent 63.3 hours working on the Computer Alliance case, primarily in review of former accountants' workpapers for litigation support.

Based upon what Bohl had told him, Schafer told Bohl that he did not believe that either of these circumstances created a conflict of interest.

Bohl was appointed as the operating trustee of Micro-Time on June 2, 1988. At the request of the U.S. Trustee, Bohl reviewed several documents relating to his appointment, as well as 11 U.S.C.A. § 101(13), and prepared a declaration of disinterestedness. Bohl subsequently applied to retain Parker, Bohl & Associates as accountants for the trustee. That application, which included a statement that the firm did not hold any interest adverse to Micro-Time and that neither Bohl nor any member of his firm had "any relationship or interest in [Micro-Time] or any other party in interest," was approved on 12, 1988.

Stockler asserts that Bohl's work for Comerica, as well as what Stockler alleges is a continual attempt to solicit additional work from Comerica, creates a conflict of interest which should disqualify Bohl as trustee and Parker, Bohl & Associates as accountants for the trustee. He also contends that Bohl and his accounting firm should be denied any fees for work already performed.

Stockler contends that Bohl's answers to interrogatories reveal that Bohl made presentations to and had discussions with personnel from Comerica's Central Loan Administration department while attempting to solicit work for RGB Management Services. Stockler alleges that this was the same department, and some of the same individuals, with which Bohl, as trustee, negotiated a settlement of litigation between Micro-Time and Comerica. Stockler

contends that this settlement was excessive in light of Comerica's underlying cause of action and that it prejudiced Micro-Time and its creditors. Stockler implies that Bohl's alleged conflict of interest, stemming from his desire to solicit additional work from Comerica, caused him to agree to a settlement favorable to Comerica but prejudicial to Micro-Time, and to generally neglect his duties as operating trustee.[2]

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[2] Stockler also claims that Parker, Bohl & Associates' fee application seeks fees for work performed by accountants but which is customarily considered to be the duty of the trustee. Stockler alleges that this is an attempt by Bohl to receive more fees for his trustee's services than allowed by 11 U.S.C.A. § 326(a). Stockler characterizes this as "double dipping" and asserts that it is not in the best interest of the estate.

Bohl denies these allegations, contending that he acted to the extent of his best judgment and without any intent to "double dip."

Because of the result reached herein, the court will not address this allegation.

In response, Bohl asserts that at no time did he believe that he had an actual conflict of interest or any interest adverse to that of Micro-Time. He states that neither he nor Parker, Bohl & Associates had ever been employed by Comerica or any other creditor of Micro-Time. He also notes that he was not represented by counsel at the time he accepted the appointment as operating trustee and implies that he relied upon the opinion of the debtor's counsel, Arnold Schafer, in concluding that his work for Comerica did not present a conflict of interest. Bohl contends that he believed his declaration of disinterestedness to be accurate at the time he executed it and that he continues to believe that it is accurate.

Bohl claims that, after being appointed operating trustee, he informed Otis Kirkland, president of Micro-Time, and Ellen Wilson, Micro-Time's office manager, that he was a consultant to Comerica in the Computer Alliance case. In addition, once he discovered that one of the Comerica employees involved with Micro-Time had also worked on the Commuter Alliance case, Bohl advised Kirkland and Wilson of his acquaintance with that employee.

Bohl also stated in his affidavit that he believes he advised an attorney with the Office of the U.S. Trustee of his work for Comerica at the first status conference in June, 1988. However, Bohl's attorney admitted at the hearing on this matter that he has no proof that the disclosure was actually made at that time. Bohl notes that the Office of the U.S. Trustee certainly had notice of Bohl's involvement

with Comerica in November 1988, when Kirkland sent a letter to the U.S. Trustee regarding the situation.

With recard to the settlement reached between Comerica and Micro-Time, Bohl contends that he undertook his own investigation of the matter and then acted in good faith, for the benefit of the estate. In addition, he alleges that it was Kirkland himself who actually negotiated the final settlement figure and then signed the settlement documents along with the trustee.

Bohl also argues that Stockler and any other party should be found to have waived their right to question the propriety of the settlement and to raise the conflict of interest issue. He contends that all parties in interest had notice of the settlement and should have raised their objections at that time. He implies that

Stockler is questioninq the settlement now only because he can cast it in a bad light in conjunction with Bohl's alleded conflict of interest. Acccrodingly, Bohl requests that this Court conclude that he does not have a conflict of interest and award him the requested fees.

III. Conflict of Interest

A. The Accountant for the Trustee

A bankruptcy trustee may apply for court approval to employ professional persons, including accountants, to represent the trustee in carrying out the trustee's duties. 11 U.S.C.A. § 327(a) (west 1979). Any such professional persons appointed to represent or assist the trustee must be disinterested and may not "hold or represent an interest adverse to the estate.... " Id. "Disinterested person" is defined by section 101(13):

"disinterested person" means person that-

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not an investment banker for any outstanding security of the debtor;

(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;

(D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and

(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason.

11 U.S.C.A. § 101(13)(West 1979).

Althouah section 101(13)(A) states that a creditor of the debtor cannot be a disinterested person in a case under chaster 7, 11, or 12,

> Section 327(c) states that a professional is not disqualified "solely because of such person's employment by or representation of a creditor," so long as he does not represent them simultaneously in connection with the case. The emphasis here is on the word "soley," which means that, if other circumstances exist, disqualification may be required...."

In re Roberts, 46 B.R. 815, 822 (Bankr. D. Utah 1985), modified, 75 B.R. 402 (D. Utah 1987). Such a professional may be disqualified from employment by the trustee if, upon objection by a creditor or the U.S. Trustee, the court finds that the professional's employment presents a conflict of interest.[3] 11 U.S.C.A. § 327 (c)(West Supp. 1989). In addition, a

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[3] "A 'conflict of interest,' as usually applied to an attorney, refers to the representation by a given attorney or law firm of two or more entites holding or claiming adverse interests or of an entity holding an interest adverse to that of its attorney, its attorney's firm or the firm's associates." In re Roberts, 46 B.R. 815, 827 (Bankr. D. Utah 1985), modified, 75 B.R. 402 (D. Utah 1987).

professional cannot be employed by the trustee if that person has "an interest materially adverse to the interest of the estate or any class of creditors or equity security holders..."[4] 11 U.S.C.A. 101(13)(E)(West 1979).

The case law makes it clear that "the standards for the employment of professional persons are strict. . ." In re Consolidated Bancshares, Inc., 785 F.2d 1249, 1256 n.6 (5th Cir. 1986).

> [T]he avoidance of a real appearance of impropriety is of chief concern to

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[4] "To 'hold an adverse interest' means for two or more entitles (1) to possess or assert mutuallyexclusive claims to the same economic interest, thus creating either an actual or potential dispute between the rival claimants as to which, if any, of them the disputed right or title to the interest in question attaches under valid and applicable law; or (2) to possess a predisposition or interest under circumstances that render such a bias in favor of or against one of the entities." In re Roberts, 46 B.R. 815, 826-27 (Bankr. D. Utah 1985), modified, 75 B.R. 402 (D.Utah 1987).

> a court or bankruptcy. . . [I]t is not sufficient that the trustee and his counsel actually be disinterested; the appearance of... [interestedness] must also be avoided: "It becomes the duty of the trustee and of his attorneys not only to be impartial and free from the influence of any secured holder, but the other security holders must have faith and confidence in their impartiality and independence."

In re Perry, Adams & Lewis Securities, Inc., 5 B.R. 63, 64 (Bankr. W.D. Missouri (1980) (quoting In re Chicago Road Transit Co., 93 F.2d 832, 838 (7th Cir. 1937)). See also, In re Paolino, 80 B.R. 341, 345 (Bankr. E.D. Pa. 1987) ("The definition of disinterestedness in the Code covers not only actual impropriety, but the appearance of impropriety as well.") In re Codesco, Inc., 18 B.R. 997, 999 (Bankr. S.D.N.Y. 1982) ("a 'disinterested' person should be divested of any scintilla of personal interest which might be reflected in his decision concerning estate matters.").

A court may deny compensation for services and reimbursement of expenses if the court finds that a professional person is not disinterested or represents or holds an interest adverse to the estate with respect to the matter on which such professional person is employed. 11 U.S.C.A. 328(c) (West 1979). See In re Roberts, 46 B.R. 815 (Bankr. D. Utah 1985), modified, 75 B.R. 402 (D. Utah 1987), and the cases cited therein. It does not matter that no fraud or unfairness resulted from the professional's work. "Where an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation." Woods v. City National Bank & Trustee Co. of Chicaco, Inc., 312 U.S. 262, 268 (1941).

B. The Trustee

The requirement that the trustee of a chapter 11 estate be a disinterested person is imposed by section 1104(c).[5] The definition of "disinterested person" found in section 101(13) is applicable to chapter 11 trustees, as well to professional persons. In re Paolino, 80 B.R. 341, 345 (Bankr. E.D. Pa. 1987). See also 5 Callier on Bankruptcy ¶ 1104.04[1] (L. King 15th ed. 1979). Therefore, the case law and analysis relating to professional persons can also be applied to chapter 11 trustees.

"Given the definition of 'disinterested' in section 101(13)(E), either a trustee or his or her counsel must

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[5]Section 1104(c) states in pertanent part:

If the court orders the appointment of a trustee . . . then the United States trustee, after consultation with parties in interest shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve as trustee or examiner, as the case may be, in the case.

be disqualified where it holds an interest adverse to the estate whether or not it acts to advance that interest." In re Paolino, 80 B.R. at 345. Similarly, a trustee who has been found to hold an interest adverse to the estate or to be not disinterested may be denied compensation for services and reimbursement of expenses. Id. at 344.

IV. The Disclosure Requirement

> It is for the court to decide whether the attorney's proposed interest carries with it a sufficient threat of material adversity to warrant prophylactic action [such as dis-qualification]. . . The question is not necessarily whether a conflict exists. . . . but whether a potential conflict, or the perception of one, renders the (pro-fessional's] interest materially adverse to the estate or the creditors.

In re Martin, 817 F.2d 175, 182 (1st Cir. 1987). Therefore, "[i]t is incumbent upon the professional to disclose to the court any material fact which may relate to

disinterestedness." 2 Collier on Bankruptcy § 327.03[3][a] (L. King 15th ed. 1979). See also In re Diamond Lumber, Inc., 88 B.R. 773, 777 (N.D. Tex. 1988).

Disclosure of information relating to a professional's disinterest must be made in the application to employ such person. These applications must conform to Bankruptcy Rule 2014(a):

> An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327 or § 1103 of the Code shall be made only on application of the trustee or committee, stating the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in

interest, their respective attorneys and accountants.

Failure to adequately disclose information relating to a professional person's disinterestedness may result in a disallowance of fees for services and reimbursement of expenses. In re Diamond Lumber, Inc., 88 B.R. 773, 777 (N.D. Tex. 1988). See also In re Consolidated Bancshares, Inc., 785 F.2d 1249, 1256 n.7 (5th Cir. 1986); In re Flying E Ranch Co., 81 B.R. 633, 637 (Bankr. D. Colo. 1988); In re Roberts, 75 B.R. 402, 412 (D. Utah 1987).

In In re Gray, 64 B.R. 505 (Bankr. E.D. Mich. 1986), an accounting firm's application for fees and expenses was denied because the firm's position as a pre-petition creditor of the estate was not disclosed in the application to be appointed accountants for the debtor. The court rejected the applicant's claim that

the statements in the application for appointment and in the attached affidavit were materially correct because the accounting firm believed it could fairly and impartially perform its duties even though it had a pre-petition claim against the debtor. In doing so, the Gray court distinguished In re Martin, 59 B.R. 140 (Bankr. D. Me. 1986), aff'd, 62 B.R. 943 (D. Me. 1986), vacated and remanded, 817 F.2d 175 (1st Cir. 1987).

In Martin, the debtors in possession applied to employ a law firm which had taken a promissory note in lieu of a retainer. The note was secured by a mortgage on real estate owned by the debtors. The firm's status as a secured creditor was disclosed in the debtor in possession's application to employ the law firm, but the firm's employment was approved by the Bankruptcy Court even

though the firm obviously was not disinterested. Id. at 141-42. After a hearing on objections to the firm's fee application, the court concluded that the firm "should not have been employed as attorneys for the debtors in possession with the court's approval without divesting itself of its interest in the debtors' property." Id. at 144. However, the court did award fees and expenses for work performed by the firm that did not relate to the note and mortgage. The court's reasoning was essentially equitable:

> In this case it would be grossly unfair to Verrill & Dana to completely deny their application for compensation and reimbursement of expenses. The note and mortgage were revealed to the court at the commencement of the case as required by Section 328(a) and Rule 2014. Further, the propriety of such lien has never been decided in this District to the court's knowledge, and the court has been unable to find a reported case since the enactment of the Code applying sections 327(a), 101(13) and 1107(a) to similar facts.

Id. at 144.

The distinguishing factor between In re Gray and In re Martin was the difference in the disclosures made in each case. In Martin, the disclosure was complete and the law firm was appointed anyway. In Gray, not only was disclosure not made but:

> [T]he application by the debtor in possession, through his counsel, affirmatively stated that "to the best of [his] knowledge" the accounting firm "represented no interest adverse to the estate . . ." and the firm's manager swore that it held "no interest adverse to the matters upon which [it was] to be engaged." Each document lacked any qualifying language acknowledging the existence of the pre-petition claim.

64 B.R. 505, 508 (Bankr. E.D. Mich. 1986).

The Gray court noted, "Had the claim been disclosed in the application, the Court would have declined to authorize the firm's retention and, presumably, no post-petition services would have been rendered by it." Id. Accordingly, the court denied

the fees sought by the accounting firm and set aside the order authorizing its employment. Id.

V. Discussion

The facts in this case are essentially the same as those in In re Gray, 64 B.R. 505 (Bankr. E.D. Mich. 1986). Although the trustee and the accountants for the trustee are not pre-petition creditors of the estate, Bohl's work for Comerica does present a potential, if not an actual, conflict of interest. Comerica was a major creditor of Micro-Time. The amount of its debt was very strongly disputed and there had been an adverse relationship between the principal of the debtor (Kirkland) and Comerica. When the trustee was appointed, it was clear that a successful resolution of Micro-Time's dispute with Comerica would be a necessary prerequisite to any successful chapter 11 reorganization of

Micro-Time. Any hint of any prior or ongoing relationship between Comerica and Bohl would create at least the appearance of impropriety. This is sufficient under the case law and section 101(13) to disqualify John C. Bohl, Jr. as trustee and Parker, Bohl & Associates as accountants for the trustee.

Like the accounting firm in Gray, Bohl did not disclose his potentially disqualifying relationship with Comerica in either the trustee's declaration of disinterest or in the affidavit he submitted when he applied for approval to appoint Parker, Bohl & Associates as accountants for the trustee. Instead, Bohl swore in his affidavit that "To the best, of my knowledge neither our firm nor any member thereof . . . holds any interest adverse to the matters upon which we are to be engaged Neither I nor any member of my

firm has any relationship or interest in the above named debtor or any other parties of interest therein. These statements were false; Bohl had an ongoing relationship with Comerica.

"The statutory requirements for the appointment of a professional to serve a bankruptcy fiduciary are well known, and if not, are certainly easy to find and understand." In re Gray, 64 B.R. 505, 508 (Bankr. E.D. Mich. 1986). Bohl has a great deal of experience, both as a bankruptcy trustee and as an accountant for the trustee.[6] He should have known about the disclosure requirements even though he was not represented by an attorney where he made his declaration of disinterest and

[6]Bohl attached an extensive list of bankruptcy cases in which he had been involved to the applications for fees and expenses submitted by the trustee and the accountants for the trustee.

when he applied to employ Parker, Bohl & Associates.

The fact that he questioned Schafer about whether his work for Comerica presented a conflict of interest indicates that Bohl was concerned about the issue. As the court stated in In re Gray, "If the applicant had any doubt on the point it should have disclosed the claim and sought a ruling." Id. at 508. Instead, the Court, the U.S. Trustee, and any other interested party was denied the opportunity to make an informed evaluation of the applicants' qualifications. And, as the U.S. Trustee stated at the hearing on this matter, Bohl and Parker, Bohl & Associates may not have been appointed if the appropriate disclosures had been made.

The Court notes Bohl's assertion that the Court has substantial discretion as to

the proper remedy in a case such as this. There is support for this argument:

> [B]ecause a bankruptcy court is a court of equity. . . the bankruptcy judge should not be bound by a completely inflexible rule mandating denial of all fees in all cases. The general rule should be that all fees are denied when a conflict is present, but the court should have the ability to deviate from that rule in those cases where the need for attorney discipline is outweighed by the equities of the case. This flexibility is supported by 11 U.S.C. 328(c), which says that the court "may" (rather than "shall") deny compensation when counsel represents an interest adverse to the interest of the estate.

In re Roberts, 75 B.R. 402, 412 (D. Utah 1987) (quoting In re Watson Seafood & Poultry Co., Inc., 40 B.R. 436, 439-40 (Bankr. E.D.N.C. 1984) (citations omitted)).

In addition, the Court is aware that the trustee and the accountants for the trustee performed sibstantial services for

the estate and that the estate dis receive some benefit from them.

However, "the denial of compensation [in such circumstances] is prophylactic. It constitutes a deterrent." In re Roberts, 46 B.R. at 847. This court agrees that "'the argument that possible harm . . . could be counter-balances by greater benefit [to the estate], . . . does not cover the . . . policy considerations which look to the harm to representation, the loss of confidence, etc.'" Id. (footnotes and citations omitted). Moreover, "'[i]t is almost impossible for a court to determine what benefit has accrued to the estate as apposed to what detriment might have accrued . . .absent a conflict of interests. . .'" Id. (footnotes and citations omitted).

Therefore, this Court holds that John C. Bohl, Jr. and Parker, Bohl & Associates

were not qualified to be appointed trustee and accountants for the trustee, respectively, and that they would not have been so appointed if they had properly disclosed Bohl's relationship to Comerica. Therefore the orders approving their employment should be vacated. The Court further holds that because Bohl and Parker, Bohl & Associates were not disinterested and because they disregarded the disclosure requirements their applications for fees and expenses should be denied.

Accordinaly, it is hereby ordered that the orders appointing John C. Bohl, Jr. as trustee and approving the employment of Parker, Bohl & Associates as accountants for the trustee are vacated, and the U.S. Trustee shall appoint a new trustee forthwith. It is also ordered that the fee applications

submited by John C. Bohl, Jr. and Parker, Bohl & Associates are denied.

Entered: JUN 2 3 1989

/S/
STEVEN W. RHODES
U.S. Bankruptcy Judge

APPENDIX D

Case No: 91-2260

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

In re: MICRO-TIME MANAGEMENT SYSTEMS, INCORPORATED

Debtor

FILED
FEB 8, 1993
LEONARD GREEN
CLERK

MICRO-TIME MANAGEMENT SYSTEMS, INCORPORATED, a Michigan Corporation; OTIS KIRKLAND, Individually and on behalf of all other Creditors; ALLARD & FISH, P.C.;

Plaintiffs

CREDITORS OF MICRO-TIME MANAGEMENT SYSTEMS, INC.
Plaintiff-Appellant

v.

ALLARD & FISH, P.C., a Michigan professional corporation;

Defendant-Appellee

DAVID W. ALLARD, JR.; DEBORAH L. FISH, jointly and severally;

Plaintiffs

DAVID W. ALLARD, JR.; DEBORAH L. FISH;

Defendants-Appellees

LAWRENCE J. STOCKLER AND ASSOCIATES, P.C., a Michigan professional corporation; LAWRENCE J. STOCKLER, jointly and severally; SCHAFER & WEINER, P.C.; ARNOLD S. SCHAFER, Individually, jointly and severally

Defendants

BEFORE: JONES and SILER, Circuit Judges; PECK, Senior Circuit Judge

Upon consideration of the appellant's motion for leave to file an oversized petition for rehearing,

It is ORDERED that the motion be, and it hereby is, GRANTED.

Furthermore, upon consideration of the petition for rehearing,

It is ORDERED that the petition be DENIED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

/s/

(2)

No. 92-1810

Supreme Court, U.S.
FILED
JUN 16 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

IN RE: MICRO-TIME MANAGEMENT SYSTEMS, INC.,
Debtor,

MICRO-TIME MANAGEMENT SYSTEMS, INC.; OTIS KIRKLAND, Individually and on behalf of all other Creditors, (91-2261),
Plaintiffs,

and

CREDITORS OF MICRO-TIME MANAGEMENT SYSTEMS, INC., (91-2260),
Plaintiffs-Petitioners,

v

ALLARD & FISH, P.C.; DAVID W. ALLARD, JR.; and DEBORAH L. FISH, Jointly and Severally,
Defendants-Respondents,

ALLARD & FISH, P.C.; DAVID W. ALLARD, JR., and DEBORAH L. FISH,
Third-Party Plaintiffs,

v

LAWRENCE J. STOCKLER AND ASSOCIATES, P.C.; LAWRENCE J. STOCKLER, Jointly and Severally; SCHAFER & WEINER, P.C.; ARNOLD S. SCHAFER, INDIVIDUALLY, Jointly and Severally,
Third-Party Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JOHN E. McSORLEY (P17757)*
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DATED:
June 16, 1993

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER LAWRENCE STOCKLER'S PETITION HAS ANY VALIDITY OR LEGITIMACY INDEPENDENT OF THE PETITION FILED BY THE ACTUAL PLAINTIFFS IN THIS CASE; WHETHER "THE CREDITORS" ARE PARTIES TO THIS ACTION; AND WHETHER STOCKLER REPRESENTS THEM OR HAS STANDING TO PURSUE A PETITION ON THEIR BEHALF?

II.

WHETHER THE TWO ALLEGED CONSTITUTIONAL ISSUES WHICH WERE NOT PRESENTED TO OR RULED ON BY THE COURTS BELOW ARE PROPERLY BEFORE THIS COURT?

III.

WHETHER THIS PETITION SHOULD BE GRANTED WHERE STOCKLER HAS NOT ILLUSTRATED ANY INTER-CIRCUIT CONFLICT, AN IMPORTANT ISSUE OF FEDERAL LAW, A CONFLICT WITH A DECISION OF THIS COURT, OR ANY OTHER SPECIAL OR IMPORTANT REASON JUSTIFYING A WRIT OF CERTIORARI?

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REASONS FOR DENYING THE WRIT:

I. LAWRENCE STOCKLER'S PETITION DOES NOT HAVE ANY VALIDITY OR LEGITIMACY INDEPENDENT OF THE PETITION FILED BY THE ACTUAL PLAINTIFFS IN THIS CASE; "THE CREDITORS" ARE NOT NOW, AND HAVE NEVER BEEN, PARTIES TO THIS ACTION; AND IF THEY ARE INVOLVED IN ANY WAY, STOCKLER CANNOT REPRESENT THEM DUE TO HIS THIRD-PARTY DEFENDANT STATUS, A DISTRICT COURT ORDER FOR HIS COMPLETE WITHDRAWAL, AND THE FACT THAT THE CREDITORS, IF INVOLVED, HAVE A PENDING PETITION (92-1897) AND LEGAL COUNSEL (DARWYN FAIR). 14

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No. 92-1810

In The

Supreme Court of the United States

October Term, 1992

IN RE: MICRO-TIME MANAGEMENT SYSTEMS, INC.,
Debtor,

MICRO-TIME MANAGEMENT SYSTEMS, INC.; OTIS KIRKLAND,
Individually and on behalf of all other Creditors, (91-2261),
Plaintiffs,

and

CREDITORS OF MICRO-TIME MANAGEMENT SYSTEMS, INC., (91-2260),
Plaintiffs-Petitioners,

v

ALLARD & FISH, P.C.; DAVID W. ALLARD, JR.; and DEBORAH L. FISH,
Jointly and Severally,
Defendants-Respondents,

ALLARD & FISH, P.C.; DAVID W. ALLARD, JR., and DEBORAH L. FISH,
Third-Party Plaintiffs,

v

LAWRENCE J. STOCKLER AND ASSOCIATES, P.C.; LAWRENCE J. STOCKLER, Jointly and Severally; SCHAFER & WEINER, P.C.; ARNOLD S. SCHAFER, INDIVIDUALLY, Jointly and Severally,
Third-Party Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS AND JUDGMENTS DELIVERED BY THE COURTS BELOW

Respondents are dissatisfied with the presentation of this item in Petitioner's Petition. In particular, the "courts below" in this independent adversary proceeding are the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan, Southern Division. Petitioner has included the opinions and judgments of

those courts as Appendix items 1a, 1b, and 1d. However, the Memorandum Opinion and Order entered in the Chapter 11 bankruptcy proceeding relative to Micro-Time Management Systems, Inc. by the United States District Court, Eastern District of Michigan, Bankruptcy Court (attached by Petitioner as Appendix item 1c) is not an opinion or judgment of a court below in this independent adversary proceeding, and it was not a subject of the appeal of this independent adversary proceeding to the Sixth Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS

Respondents are dissatisfied with the presentation of this item in Petitioner's Petition. In particular, neither the constitutional provision relative to due process nor the constitutional provision relative to the right to trial by jury, or any arguments relative to either, were presented to either the district court or the Sixth Circuit Court of Appeals, nor were either of those constitutional issues ruled on by either court below. Therefore, neither the constitutional arguments and the constitutional provisions relative thereto, are properly before this Court.

COUNTER-STATEMENT OF THE CASE

This Counter-Statement of the case is necessary to correct inaccuracies and omissions in the statement of the case by petitioner.

I.

INTRODUCTION

On May 4, 1989, the United States District Court for the Eastern District of Michigan Bankruptcy Court

entered an order confirming the debtors' third amended plan of reorganization (Exhibit I to R32) relative to the Chapter 11 bankruptcy of Micro-Time Management Systems, Inc. ("MTMS"). MTMS and its president, Otis Kirkland, subsequently filed this independent adversary proceeding alleging, in essence, legal malpractice by the trustee's attorney during the course of the bankruptcy proceedings prior to the confirmation of the plan.

The adversary proceeding was removed from the bankruptcy court to the district court, which dismissed the Complaint based on the *res judicata* effect of the final adjudication of the bankruptcy proceedings through the order confirming the debtors' third amended plan of reorganization.

MTMS and Otis Kirkland appealed and the Sixth Circuit affirmed. MTMS and Otis Kirkland have filed a petition for writ of certiorari with the United States Supreme Court which has been docketed as #92-1897. Although MTMS and Otis Kirkland are the only Plaintiffs to this action, and they have filed their own petition to this Court, Lawrence Stockler ("Stockler") has filed this petition purportedly on behalf of "the Creditors of MTMS".

"The Creditors of MTMS" are not now, and have never been, parties to this independent adversary proceeding. This independent adversary proceeding was filed by MTMS and Otis Kirkland "individually and on behalf of all other creditors". However, contrary to the procedural rules applicable to adversary proceedings (Bankruptcy Rules 7017-7025), no individual creditor, group of creditors, or class of creditors ever perfected any potential party standing.

As the Creditors are not parties to this action, and neither Stockler nor his law firm are parties (other than

as third-party defendants on a third-party complaint which was not the subject of the appeal to the Sixth Circuit) and as Otis Kirkland, even in his "representative" capacity "on behalf of all other creditors", is currently pursuing his own petition to this Court, and as the Sixth Circuit Court of Appeals completely disposed of Stockler's "creditors" appeal to that Court on threshold standing grounds in a footnote in its opinion, Stockler's Petition to this Court, purportedly on behalf of "the creditors", is not in compliance with the most basic procedural rules.

II.

INACCURACIES IN THE PETITION.

In his statement of the case, Stockler essentially concedes all the relevant facts as set forth in the Sixth Circuit opinion except one; that "the creditors" had pre-confirmation knowledge of the alleged cause of action against Allard & Fish. Stockler implies at page 3 that the creditors were not made aware of the alleged conflict of the trustee and the corresponding alleged cause of action against Allard & Fish. However, as noted in the Sixth Circuit opinion, the *record* reflects that prior to the confirmation of the plan of reorganization, MTMS, Otis Kirkland, the MTMS bankruptcy attorney, the bankruptcy court, the United States Trustee's Office, and the unsecured creditors committee had knowledge of the alleged conflict and thus the alleged cause of action against Allard & Fish.

It is vital for this Court to note that the issue of such widespread knowledge was not controverted at the district court level. As supported by exhibits to the Allard & Fish motion to dismiss, the record contained extensive support for this widespread knowledge, including knowledge by the creditors committee. Stockler merely

argued in the Sixth Circuit, without any factual or evidentiary support by way of documents, affidavits, or any other evidence, that "the creditors", (apparently all 370 of them) did not have any knowledge of the alleged conflict and the alleged cause of action against Allard & Fish. Confirming the lack of evidentiary support, Stockler's petition does not reference any record item in support of this alleged lack of knowledge.

However, for purposes of this Court's consideration of this petition for writ of certiorari, Stockler's entire petition rests on that one factual issue for which Stockler has not, and does not now, present any evidentiary support.

A second primary inaccuracy in the statement of the case is the reference to documents, transcripts and events in the bankruptcy proceeding which never became part of the record in this independent adversary proceeding and were not part of the record on appeal to the Sixth Circuit.

Both Stockler and MTMS/Kirkland continuously attempted to expand the record on appeal and during the pendancy of the Sixth Circuit appeal MTMS and Kirkland filed a motion in the district court to include the entire bankruptcy record in the record on appeal. In the instant petition, Stockler continues his attempt to expand the record on appeal. Stockler's petition references and quotes from an August 14, 1990 transcript from the Bankruptcy Court (pp. 6-7, 13-15, n.1), references and quotes from a September 16, 1991 district court opinion regarding a fee application (pp. 10, 24-25, 39-40) and quotes from a transcript of a December 17, 1990 Bankruptcy Court hearing (p. 21, n. 3). None of these references provide a citation to the record in this independent adversary proceeding because they did not become part of the *record* in *this* case.

III.

OMISSIONS FROM THE PETITION (FACTS RELATIVE TO THE ISSUE OF STOCKLER'S AND/OR "THE CREDITORS"' STANDING.)

More important than the above-mentioned inaccuracies is the omission from Stockler's petition of facts relative to the threshold standing issue upon which the Sixth Circuit disposed of Stockler's appeal.

It is vital to understand that "the Creditors" of MTMS have never been parties to this action either individually or collectively. The original adversary proceeding Complaint caption referred to Otis Kirkland as appearing both "individually and on behalf of all other Creditors".

However, neither Stockler, any party to this action, nor the Court, ever took any steps to actually include any creditor as a party to this action. Otis Kirkland was the principal of the debtor, its sole shareholder and a subordinated creditor with a status equivalent to an equityholder to be paid dividends only if all other creditors were paid in full. No class action procedure, or any other procedure was implemented to include any individual creditor or group or class of creditors.

The only Plaintiffs to this action, MTMS and Otis Kirkland, *both "individually and on behalf of all other creditors"* are petitioners in Supreme Court #92-1987. That petition necessarily includes any petition by "the creditors" (as "represented" by Kirkland) if they are involved in some way in this case (which is denied).

Furthermore, even if the creditors were involved, Stockler could not represent them due to his status as a third party defendant and an unappealed order in the district court by which Stockler withdrew, which order did not reserve for him *any* representative capacity.

(R 29.) The Allard & Fish Defendants[1] filed third-party Complaints against various third-party Defendants, including Lawrence J. Stockler and his law firm. Stockler filed a motion to withdraw as counsel for all Plaintiffs (R 14) one month later on April 4, 1991. The court granted the motion and the order (R 29) did not reserve *any* representative capacity for Stockler.

After Lawrence Stockler filed his motion to withdraw, but before the order granting the motion was entered, Ken Graham filed an appearance (R 21) on behalf of *all* the Plaintiffs. Accordingly, even if the "creditors" were involved in the lawsuit as parties (which is denied and which is confirmed by the docket sheet and every relevant pleading in this matter), by either their designation as a *potential* class, or otherwise, then Ken Graham had entered his appearance for MTMS, and Otis Kirkland both individually or as a representative of a potential class of creditors.

The District Court granted Stockler's motion to withdraw by Order dated May 24, 1991. As the District Court docket sheet indicates, Stockler did not file any pleading as an attorney for any party or alleged party from the date of the entry of the Order of Withdrawal (May 24, 1991) (R 29) until September 21, 1991[2]. On that date he filed a response to the Allard & Fish Defendants' Motion for Summary Judgment on the primary Complaint,

---

[1] **Respondents, the Allard & Fish Defendants, disclose that there are no parent or subsidiary companies of which this Court should be aware pursuant to Supreme Court Rule 29.1.**

[2] **The document filed by Lawrence Stockler on July 10, 1991 (R 30), was a supplemental memorandum (or more properly, a reply brief) regarding Lawrence Stockler's motion for summary judgment on the third-party Complaint filed by Allard & Fish against Lawrence Stockler. This was a document being filed on behalf of Lawrence Stockler as a third-party Defendant and was not a document which purported to be on behalf of "the creditors".**

which response was purported to be on behalf of "the creditors". (R 38-42.) However, Ken Graham, on behalf of *all* Plaintiffs, had already filed a response to the Allard & Fish Defendants' Motion for Summary Judgment on September 13, 1991. (R 37.)

Allard & Fish then responded by way of objections and a request to strike the pleadings filed by Lawrence Stockler allegedly on behalf of the creditors. (R 43.)

Despite being on notice of the Allard & Fish Defendants' position that the Court had ordered the complete, unqualified withdrawal of Lawrence Stockler as an attorney in this case, and despite the fact that the creditors were not parties to this action, neither the Court, Lawrence Stockler, any attorney in this action, the Creditors Committee, any creditor (either collectively or individually), MTMS, nor Otis Kirkland (either individually or "on behalf of the creditors") took any step whatsoever to include any individual creditor or group of creditors as a party in this action.

The court then entered its Order granting the Allard & Fish Defendants' motion for summary judgment as to the primary Complaint, which effectively disposed of the entire case and all the third-party complaints and counter-claims. (R 45-46.)

Stockler then attempted to file a late motion for reconsideration (R 47) which was denied and then filed an appeal (91-2260) (R 54) to the Sixth Circuit Court of Appeals, purportedly on behalf of "the creditors".

The actual Plaintiffs in this matter including any *potential*, yet unperfected, class of creditors as represented by Otis Kirkland, then filed their claim of appeal. (R 59.)

The two appeals progressed on independent briefing schedules in the Sixth Circuit. Lawrence Stockler filed

his Appeal Brief in his appeal (91-2260) and interestingly, the Disclosure of Corporate Affiliations and Financial Interest identified "Lawrence J. Stockler" as the *party* on whose behalf the brief was being filed, and indicated *his* disclosure of corporate affiliations and financial interests.

Stockler's appeal brief, like the instant petition, failed to address the threshold standing issues with regard to party status of "the creditors", failed to address Stockler's capacity to represent them, and failed to establish the independent validity of Stockler's "creditors" appeal in relation to the appeal filed by MTMS and Otis Kirkland both individually and "on behalf of all other creditors".

Allard & Fish then filed their appeal brief which extensively discussed the threshold standing issues. Stockler then filed a reply brief which again did not address those issues and did not provide any support for Stockler's independent "creditors" appeal.

Allard & Fish then filed a motion to dismiss based on lack of jurisdiction as well as a motion for costs and attorneys fees pursuant to F.R.A.P. 38. Stockler's response to both the motion to dismiss and the motion for costs and attorneys fees, and the respective briefs in support of each, again did not provide any factual or legal support for the independent validity of the "creditors" appeal, any party status on behalf of "the creditors", or Stockler's capacity to represent any creditor or group of creditors.

Although the Sixth Circuit Court of Appeals denied both the motion to dismiss and the motion for costs and attorneys fees, the Court of Appeals completely disposed of Stockler's "creditors" "appeal" in a short footnote in the per curiam opinion disposing of both

Stockler's "appeal" and the appeal by the actual Plaintiffs, which opinion affirmed the district court's dismissal of the adversary proceeding.

Both Stockler and the actual Plaintiffs then filed motions for rehearing which were denied. In Stockler's motion for rehearing, he raised, for the first time in these proceedings, a claim that the unfavorable result with regard to his "creditors" "appeal" violated the due process rights of the creditors. The Sixth Circuit Court of Appeals properly rejected Stockler's tardy attempt at raising this constitutional issue.

IV.

OMISSIONS FROM THE PETITION (FACTS RELATIVE TO CONSTITUTIONAL ISSUES.)

Stockler's petition suggests that constitutional issues are involved. Specifically, Stockler argues that the rulings below violated the creditors' due process rights and right to a trial by jury. In the course of all the proceedings below, the right to a jury trial issue has never been raised or presented by either Stockler or the actual Plaintiffs, nor has that issue been ruled on by the Courts below. The reference to that issue in Stockler's petition is the first reference to that issue in the course of these proceedings.

With regard to the due process issue, Stockler first raised that issue in his motion for reconsideration in the Sixth Circuit Court of Appeals at page 7, ¶ 5. The constitutional issue raised for the first time in a motion for reconsideration to the Sixth Circuit Court of Appeals was, of course, late and does not act to preserve that issue for purposes of a petition to the Supreme Court.

Accordingly, neither the due process issue nor the jury trial issue was presented by Stockler in any of the

proceedings below. In particular, neither argument appeared in Stockler's appeal brief, reply brief on appeal, answer to motion to dismiss and brief in opposition to motion to dismiss, the answer to the motion for costs and attorneys fees or the brief in opposition to the motion for costs and attorneys fees.[3]

V.

INACCURACIES AND OMISSIONS FROM THE PETITION (FACTS RELATIVE TO WHETHER STOCKLER'S PETITION PRESENTS ISSUES WHICH WOULD JUSTIFY A WRIT OF CERTIORARI.)

Stockler's petition presents essentially four arguments; however, he misstates or omits facts relative to each. First he presents the constitutional issues which, as indicated above, were not properly preserved for appeal to this Court.

Second, he argues that any claim by the creditors against Allard & Fish are independent of any claims by MTMS and Kirkland against Allard & Fish. The Court of Appeals never was required to address this issue because it disposed of Stockler's appeal on the ground that Stockler did not represent any party to the action and the Court ruled that any claim by any creditor against Allard & Fish based on the representation of the trustee would be barred by *res judicata*.

Third, Stockler argues that a trustee's attorney owes certain duties to the creditors in a bankruptcy proceeding. The issue of whether duties were owed was

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[3] **In the brief in opposition to the motion for costs and attorneys fees, at pages 17 through 19, Stockler raises a constitutional issue but it is limited to arguing that "due process requires that sanctions not be imposed without a full evidentiary hearing." That is not the same due process issue that Stockler raises in the instant petition.**

never addressed by either of the courts below in this independent adversary proceeding. The matter was disposed of on the threshold issue of the *res judicata* affect of the order confirming the plan of reorganization.

Fourth, Stockler argues that the creditors had no pre-confirmation knowledge of the alleged cause of action against Allard & Fish. This was the primary factual issue upon which the district court and the Sixth Circuit resolved the *res judicata* issue. Neither Stockler (purporting to represent the creditors) nor MTMS, nor Kirkland (both individually and as an alleged representative of all other creditors) controverted the fact established by the Allard & Fish motion to dismiss that not only the debtor and the unsecured creditors committee but also the court, the United States Trustee's Office and MTMS bankruptcy counsel had pre-confirmation knowledge. Therefore, both the district court and the Sixth Circuit properly resolved this factual issue. Stockler does not cite to any items in the record supporting his argument on the knowledge issue and does not illustrate how the courts below erred in deciding the issue.

Essentially, Stockler therefore again ignores the threshold standing issue upon which the court below disposed of his appeal. The Sixth Circuit correctly held that Stockler did not represent any party to this action. Stockler's petition avoids this issue and addresses issues that the courts below either properly decided (the existence of pre-confirmation knowledge) or were not required to address due to the disposition on the *res judicata* issue.

SUMMARY OF ARGUMENT

"The creditors", on whose behalf Stockler purports to file this petition, are not now, and have never been, parties to this action. Lawrence Stockler and his law firm are also not parties to the primary complaint in this matter. Lawrence Stockler is subject to an order entered by the district court by which he withdrew from representing any and all parties to this matter. Also, he is a third-party defendant on a third-party claim, such party status prohibiting him from representing any party in this matter.

Therefore, as the Sixth Circuit properly recognized, Stockler does not represent any party or appellant in this matter. Stockler's petition to this Court does not address these fundamental standing issues in any way. Stockler does not illustrate how the Sixth Circuit's ruling on this issue was erroneous, much less that any special or important issue is involved that would justify a writ of certiorari.

Stockler's two constitutional issues were never presented to or ruled on by the courts below and are therefore not properly before this Court.

Stockler does not present any other special or important issues justifying a writ of certiorari. His claim that the creditors did not have pre-confirmation knowledge of the alleged cause of action against Allard & Fish, which argument is set forth to avoid the *res judicata* bar, is unsupported and, in any event, merely presents an issue of what is a party's burden of controverting an issue of fact in response to a motion for summary judgment or dismissal. Stockler does not explain how that issue was erroneously decided, and certainly does not illustrate how that issue presents an inter-circuit conflict, an important issue of federal law, or a decision which conflicts with a decision of the Supreme Court.

Stockler's other arguments relate to issues there were not addressed by the Court's below and are thus not properly before this Court.

REASONS FOR DENYING THE WRIT

I.

LAWRENCE STOCKLER'S PETITION DOES NOT HAVE ANY VALIDITY OR LEGITIMACY INDEPENDENT OF THE PETITION FILED BY THE ACTUAL PLAINTIFFS IN THIS CASE; "THE CREDITORS" ARE NOT NOW, AND HAVE NEVER BEEN, PARTIES TO THIS ACTION; AND IF THEY ARE INVOLVED IN ANY WAY, STOCKLER CANNOT REPRESENT THEM DUE TO HIS THIRD-PARTY DEFENDANT STATUS, A DISTRICT COURT ORDER FOR HIS COMPLETE WITHDRAWAL, AND THE FACT THAT THE CREDITORS, IF INVOLVED, HAVE A PENDING PETITION (92-1897) AND LEGAL COUNSEL (DARWYN FAIR).

Stockler's petition suggests that there are certain constitutional issues and other issues at stake regarding the Sixth Circuit's rejection of his "creditors"' appeal on procedural grounds. The issues Stockler seeks to have this Court consider were never reached by the Sixth Circuit because the Sixth Circuit completely rejected Stockler's standing to even bring an appeal to that Court.

In footnote 1 of the Sixth Circuit opinion in this matter, the Court unanimously held:

> 1. The complaint in this independent adversary proceeding referenced Kirkland as representing "all other creditors *who would seek to participate* in this action", which was the Sixth Circuit's recognition that:
>
> a. The creditors were originally included only as a potential class and not as a party,

b. At the time of dismissal the creditors, either individually or collectively, had not "sought to participate" nor had they become parties, and

c. Therefore whoever represented Kirkland also represented the unperfected, potential class of creditors,

2. Substitute counsel for MTMS and Kirkland represented Kirkland in his individual capacity and in his capacity as a representative of the potential class of creditors,

3. When Stockler withdrew he withdrew from representing MTMS, Kirkland (both individually and as a representative of a potential class of creditors) and the potential class of creditors because the class had not been perfected at the time and no creditor other than Kirkland was a party, and

4. Stockler no longer represented *any* plaintiff or appellant in this case.

Although the Sixth Circuit completely disposed of Stockler's appeal in ruling as outlined above, Stockler's petition to this Court does not illustrate how any of those dispositive rulings were erroneous, much less that they were erroneous for some reason that would justify this Court's issuance of a discretionary writ of certiorari due to the involvement of some special or important issue. Although these fundamental threshold issues are not addressed by Stockler, he implies that the Sixth Circuit erroneously minimized, rejected, and consolidated his appeal with that of the actual plaintiffs. For the reasons set forth below, the Sixth Circuit disposition of his appeal was correct.

The Bankruptcy Rules provide that certain Federal Rules of Civil Procedure apply to adversary proceedings. The Federal Rules of Civil Procedure regarding necessary joinder (F.R.C.P. 19), permissive joinder (F.R.C.P. 20), misjoinder and non-joinder (F.R.C.P. 21), interpleader (F.R.C.P. 22), class actions (F.R.C.P. 23), actions relating to unincorporated associations (F.R.C.P. 23.2), intervention (F.R.C.P. 24) and substitution (F.R.C.P. 25) are made applicable to adversary proceedings by Bankruptcy Rules 7019, 7020, 7021, 7022, 7023, 7023.2, 7024, and 7025, respectively. In addition, F.R.C.P. 17 requiring that actions be prosecuted in the name of the real party in interest is rendered applicable to adversary proceedings by Bankruptcy Rule 7017.

There is no rule that provides that any party involved in a bankruptcy matter has *ipso facto*, by that involvement, become a "party" in an adversary proceeding that is brought based on that bankruptcy or any potential causes of action between any parties involved in the bankruptcy.

Despite the orderly and comprehensive set of civil procedure rules regarding adversary proceedings, neither the Court, on its own initiative, Lawrence Stockler, Ken Graham, Micro-Time Management Systems, Otis Kirkland (either individually or on "behalf of the creditors"), the creditors committee or any creditor either individually or collectively ever sought to utilize any of these rules or procedures to make any other individual creditor, any group of creditors or any class of creditors a party to this action.

Even after Allard & Fish objected in writing (R 43) to Lawrence Stockler's "creditors" response (R 40, 41) to the Allard & Fish motion for summary judgment (R 31, 32) on the ground that the creditors were not parties to the action, no action was taken by anyone, including

Stockler, to attempt to make any creditor or group of creditors parties to this action.

However, despite the lack of any client, and the lack of any court authorized representative capacity, and in fact in direct contradiction to an existing order of the court ordering his unconditional withdrawal as an attorney in this action, Stockler continued to file pleadings in the District Court and then initiated an appeal to the Sixth Circuit and now this petition to the United States Supreme Court.

The lack of a client and lack of any authorized representative capacity on the part of Mr. Stockler is even more striking in light of the fact that all of the actual plaintiffs in this action are currently being represented by counsel and are in fact pursuing their own petition to this Court. If "the creditors" are involved in this action in any way (and that is denied and not supported by the record) then "the creditors" are involved in another pending petition and are represented by counsel (Darwyn Fair).

In attempting to get around these many insurmountable problems, Stockler references in his footnote 2 one irrelevant pleading by the City of Southfield, which sets forth one creditor's lack of an objection to reopening the bankruptcy case, and one alleged phone message note allegedly reflecting an unexplained and unspecified "no objection" to something. This is apparently Mr. Stockler's support for his position that he represents some, or remarkably all 370 creditors. That certainly does not substitute for compliance with the court rules and does not render the creditors (certainly not all 370 of them) parties to this case.

The Sixth Circuit's rejection of Stockler's appeal on these procedural grounds was correct. See, *First Federal*

of Michigan, et al v. *Barrow*, 878 F.2d. 912 (C.A.6, 1989) (unlike this case, in *Barrow* a class of defendant creditors was certified in a trustee's adversary proceeding after the proper procedure of moving to certify the class had been complied with), and *In Re Butler*, 94 BR 433 (Bkrtcy. N.D. Tex., 1989) (the adversary proceeding initiated by the "Creditors Committee" was not being pursued by the "real party in interest" and was therefore dismissed. In so holding, the court held that the individual aggrieved creditors should have filed the adversary proceeding in their individual capacities and sought class certification of the class consisting of all other creditors. 94 BR at 436).

II.

THE TWO ALLEGED CONSTITUTIONAL ISSUES WERE NOT PRESENTED TO OR RULED ON BY THE COURTS BELOW AND ARE NOT PROPERLY BEFORE THIS COURT.

This Court will not consider issues, particularly constitutional issues, that have not been properly preserved by being presented to and ruled on by the courts below. See, *Ellis* v. *Dixon*, 349 U.S. 458; 75 S. Ct. 850; 99 L.Ed. 1231 (1955); *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644; 118 L.Ed.2d 280 (1992) and *Lytel* v. *Household Manufacturing, Inc.*, 494 U.S. 545; 110 S. Ct. 1331; 108 L.Ed.2d 504 (1990).

In this case, the alleged constitutional issue regarding the right to a jury trial was never presented to or ruled on by the courts below.

Stockler did attempt to raise the due process issue in the Sixth Circuit in his motion for rehearing. However, raising new issues, particularly constitutional issues, is not a proper utilization of Federal Rule of Appellate Procedure 40 and the circuit courts of appeal will not con-

sider issues raised for the first time in a motion for rehearing. See, *Bullock* v. *Mumford.*, 509 F.2d 384 (C.A.D.C., 1975); *Jamestown Farmers Elevator, Inc.* v. *General Mills, Inc.*, 552 F.2d 1285 (C.A.8, 1977); *Anderson* v. *Knox*, 300 F.2d 296 (C.A.9, 1962); *Costo* v. *United* States, 922 F.2d 302 (C.A.6, 1990); *United States* v. *Smith*, 781 F2d 184 (C.A. 10, 1986) (petition for rehearing cannot raise an issue previously waived: here failure to raise the constitutional issue waived it), and *Marion Steamshovel Co.* v. *Bertino*, 82 F.2d 945 (C.A.8, 1936) (*Id*).

Stockler's attempt to raise the due process issue in the motion for rehearing to the Sixth Circuit Court of Appeals did not preserve that issue. As neither of Stockler's constitutional issues were properly raised or preserved in the courts below, they are not properly before this Court and those issues are not open for review in Stockler's petition.

III.

STOCKLER HAS NOT PRESENTED ANY OTHER SPECIAL OR IMPORTANT REASON JUSTIFYING A WRIT OF CERTIORARI.

Stockler presents essentially four arguments in his petition. First, the constitutional issue, as discussed above, is not properly before this Court.

Second, he argues that any creditors claim against Allard & Fish would be independent of any claim by MTMS and Kirkland against Allard & Fish. First, that was not the basis upon which the Sixth Circuit disposed of Stockler's appeal, and in fact neither court below even addressed that issue. The Sixth Circuit, however, noted that any claim based on alleged errors or omissions of Allard & Fish during the bankruptcy proceeding filed by either the debtor or the creditors would be barred by *res judicata*. Finally, Stockler does

not illustrate how this issue presents any inter-circuit conflict, involves an important issue of federal law, or that the Sixth Circuit ruled on that issue contrary to some decision of the Supreme Court.

Third, Stockler argues that a trustee's attorney owes certain duties to the creditors in a bankruptcy proceeding. Again, that issue was not addressed by either court below and did not form the basis of the disposition of Stockler's appeal. The courts below held that *res judicata* would apply regardless of the merits of any claim by the debtors or creditors against Allard & Fish. Further, Stockler does not illustrate how this issue presents an inter-circuit conflict, an important issue of federal law, or a conflict with a decision of the Supreme Court.

Fourth, Stockler argues that the creditors had no pre-confirmation knowledge of the alleged cause of action against Allard & Fish. This was the factual basis on which the Sixth Circuit ruled that both MTMS and Kirkland, and parenthetically any creditor or group of creditors, had knowledge of the alleged cause of action against Allard & Fish prior to the confirmation. The record in this case reflects that the Allard & Fish motion was well supported with regard to that factual issue of knowledge, and moreover that neither MTMS/Kirkland nor Stockler controverted that factual issue in response to the motion. Furthermore, this factual issue, or the legal issue of a party's burden in controverting an issue of fact in response to a motion for summary judgment is not an issue that presents an inter-circuit conflict, an important issue of federal law, or an issue which conflicts with a decision of the Supreme Court.

Finally, even though Stockler completely ignores the issue, the basis for the Sixth Circuit disposition of his

appeal (Stockler has no client, the creditors are not parties to this action, and in any event Stockler could not represent them) does not present an issue of an inter-circuit conflict, an important issue of federal law, or a decision which conflicts with a decision of the Supreme Court.

The disposition of the appeal in the Sixth Circuit affirming the dismissal based on *res judicata* was entirely proper. It was proper even if the creditors were somehow involved in this matter. Any claim by the creditors against Allard & Fish would be subject to *res judicata* just as any claim by MTMS/Kirkland was subject to *res judicata*. See, *Stoll* v. *Gottlieb*, 305 U.S. 165; 59 S. Ct. 134; 83 L.Ed. 104 (1938); *Sanders Confectionary Products, Inc.* v. *Heller Financial, Inc.*, 973 F.2d 474 (C.A.6, 1992), *cert. den.*, 113 S.Ct. 1046; 122 L.Ed.2d 355 (1993), *rehearing denied*, 113 S. Ct. 1628; 123 L.Ed.2d 186 (1993); *In Re El San Juan Hotel Corp.*, 841 F.2d 6 (C.A. 1, 1988); *Met-L-Wood Corp.* v. *Pipin*, 861 F.2d 1012 (C.A.7, 1988), *cert. den.*, 490 U.S. 1006 (1989).

CONCLUSION

For all the foregoing reasons, respondents Allard & Fish, P.C., David W. Allard, Jr. and Deborah L. Fish, respectfully request that this Honorable Court deny Stockler's Petition for Writ of Certiorari.

Respectfully submitted,

GARAN, LUCOW, MILLER, SEWARD, COOPER & BECKER, P.C.
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By: /s/ MARK C. SMILEY (P38910)
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DATED: June 16, 1993

Supreme Court, U.S.
FILED
AUG 23 1993
OFFICE OF THE CLERK

No. 92-1810

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1992

CREDITORS OF MICRO-TIME MANAGEMENT SYSTEMS, INC.,
Petitioners,

v.

ALLARD & FISH, P.C., a Michigan professional corporation; DAVID W. ALLARD, JR.; DEBORAH L. FISH,
Jointly and Severally,
Respondents

PETITIONER'S ANSWER TO RESPONDENTS MOTION FOR DAMAGES PURSUANT TO SUPREME COURT RULE 42.2 AND 28 U.S.C. §1927

LAWRENCE J. STOCKLER*
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* Counsel of Record for Petitioner, Creditors of Micro-Time Management Systems, Inc.

PETITIONER'S ANSWER TO RESPONDENTS MOTION FOR DAMAGES PURSUANT TO SUPREME COURT RULE 42.2 AND 28 U.S.C. §1927

Petitioners, Creditors of Micro Time Management Systems, Inc., by and through their attorneys, Law Offices of Lawrence J. Stockler & Associates, P.C., hereby answer respondents motion for damages pursuant to Supreme Court Rule 42.2 and 28 U.S.C. §1927 and for its answer states as follows:

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1. In answer to paragraph one (1), Petitioners assert that Supreme Court Rule 42.2 speaks for itself but denies that Petitioners Writ of Certiorari was frivolous whatsoever.

In Folak v Sheriff's Office of Cook County, et al., 579 F.Supp. 1338 (D.C. Ill. 1984) a sheriff who was discharged brought an action against the county sheriff's office alleging that he was deprived of a property interest in public employment without a hearing. Rather than filing an answer to plaintiff's complaint, defendant filed a 50 page factual stipulation signed by the plaintiff, publicly filed in a criminal case in which the plaintiff admitted to facts underlying numerous counts of mail fraud and extortion resulting in the termination of employment for the plaintiff. Defendant filed a motion for attorney fees and other sanctions pursuant to 28 U.S.C. §1927, arguing that plaintiff's lawsuit had no merit whatsoever. The court denied defendant's request for sanctions under 28 U.S.C. §1927. The court, in denying defendants motion for damages, concluded that the procedures outlined in the stipulation of facts by the plaintiff may have created a property interest, but they do not establish what process is due. In other words, the court concluded that plaintiff's claim could not support a bad faith award because the plaintiff may have had a property interest although it was undetermined what process was due.

See also Terrestrial Systems, Inc. v Fenstemaker, et al., 132 F.R.D. 71 (D.C. Colo. 1990) where the court denied an award of damages pursuant to 28 U.S.C. §1927 when the court concluded that plaintiff's counsel exercised reasonable inquiry into factual and legal foundation as to plaintiff's claims.

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In the matter presently before this court, this action was commenced by the Creditors, through Stockler, as a creditor and a member of the Creditor's Committee, on January 8, 1991 against Allard & Fish in the United Bankruptcy Court for the Eastern District of Michigan (R.1) as a result of the legal malpractice by the respondents herein. The Creditors of Micro Time Management Systems, Inc. are seeking to have their legal malpractice claim heard against respondents herein. The Court of Appeals action of unilaterally consolidating two separate appeals resulted in the denial of allowing the creditors of MTMS the opportunity to appeal, or maintain a malpractice claim against the attorneys for the trustees for MTMS. The respondents duty to the Creditors of MTMS are separate and distinct from their attorneys duties to the trustee. The Court of Appeals actions have resulted in the denial of allowing the Creditors of MTMS the opportunity to appeal resulting in petitioners Writ of Certiorari.

2. In answer to paragraph two (2), Petitioners assert that 28 U.S.C. §1927 speaks for itself but denies that Petitioners multiplied these proceedings unreasonably or vexatiously. In actuality, as a result of Respondents' misrepresentations and inaccuracies as well as their continued fabrication and twisting of the facts so as to not give this Honorable Court or the United States Court of Appeals for the Sixth Circuit a fair presentation of this case has resulted in excessive work, including, but not limited to, costs, expenses and attorney fees such that Respondents should be forced to compensate the Petitioners for the same.

3. In answer to paragraph three (3), Petitioners admit that Respondents rely on Engra, Inc. v Gabel, 958 F.2d 643 (C.A. 5, 1992) as

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well as 28 U.S.C. §1927, but deny that the same is applicable to Petitioners Writ of Certiorari presently before this Honorable Court.

In Engra, supra, the petitioner McFarland was not named as a party to the action between plaintiff and defendant and as a non-party, McFarland had no rights in the litigation between his client and the defendant unless and until he was permitted to intervene.

In the Writ of Certiorari presently before this Honorable Court, the Creditors of Micro Time Management Systems, Inc. were always a party to the action such that intervention was not necessary. The Creditors of Micro Time Management Systems, Inc. filed a complaint. This suit was brought on behalf of the creditors. This action was commenced by the creditors, through Stockler, as a creditor and a member of the Creditors Committee, on January 8, 1991 against Allard & Fish in the United States Bankruptcy Court for the Eastern District of Michigan (R.1)(which was removed to the United States District Court for the Eastern District of Michigan) as a result of the legal malpractice by the Respondents herein. The creditors loss has amounted to several millions of dollars. The Creditors of Micro Time Management Systems, Inc. are seeking to have their legal malpractice claim heard against Respondents herein. (R.1) The Court of Appeals action of unilaterally consolidating two separate appeals resulted in the denial of allowing the creditors of MTMS the opportunity to appeal, or maintain a malpractice claim against the attorneys for the trustees for MTMS. The Respondents duty to the creditors of MTMS are separate and distinct from their attorneys duties to the trustee and that duty was violated by never notifying the creditors nor the creditors committee of the conflict of interest between Bohl and Comerica Bank as well as

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failing to advise Bohl of his obligation as trustee as was found by bankruptcy Judge Steven W. Rhodes as detailed in Petitioners Writ. The Court of Appeals actions has resulted in the denial of allowing the creditors of MTMS the opportunity to appeal resulting in Petitioners Writ of Certiorari.

Warner Brothers, Inc. v Dae Rim Trading, Inc., 877 F2d 1120 (C.A. 2, 1989) is another case that Respondents rely on but misplace the argument from that case. Specifically, plaintiff Warner Brothers, Inc. brought its extended litigation so as to secure a substantial award of statutory damages and attorney fees as a lesson and warning to defendants and other copyright infringers. Id. at 1122. The court went further and found that Warner Brothers' attorney acted improper by not following applicable statutes and rules. For example, Warner Brothers' attorney referred to certain Federal Rules of Civil Procedure for authority to secure a preliminary injunction whereby the Federal Rule of Civil Procedure that Warner Brothers' attorney relied on was totally inapplicable and provided for no provision for a preliminary injunction. Specifically, the court found that the procedure conducted by Warner Brothers' attorneys and their agents were improper as well as their search conducted by certain agents were not authorized by statute. Additionally, certain discovery was conducted without notice to opposing counsel. The factual findings in that case lead the court to conclude that the action was conducted in a vexatious, oppressive and unreasonable manner.

In the Writ of Certiorari presently before this court, it is the unsecured Creditors position that, pursuant to due process of law, they are entitled to representation by their own attorney on their own

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appeal as well as maintaining malpractice claim against the attorneys for the trustee even when there are no provisions provided for in the plan of reorganization. The Creditors of MTMS are seeking to have their legal malpractice claim heard against the Respondents herein(R.1). The Court of Appeals actions of unilaterally consolidating two separate appeals resulted in the denial of allowing the Creditors of MTMS the opportunity to appeal, or maintain a malpractice claim against the attorneys for the trustees for MTMS. Respondents duty to the Creditors of MTMS are separate and distinct from their attorneys duties to the trustee and that duty was violated by never notifying the creditors nor the Creditors Committee of the conflict of interest between Bohl and Comerica Bank as well as failing to advise Bohl of his obligation as trustee as it was found by bankruptcy Judge Steven W. Rhodes as detailed by Petitioners Writ.

4. In answer to paragraph four (4), Petitioners admit that 28 U.S.C. §1927 speaks for itself but denies that these proceedings whatsoever are unreasonable and in fact the same is well grounded in fact and is warranted by existing law. In matter of Reed, 861 F.2d 1381 (C.A. 5, 1988), Respondents rely on that case but do not fairly represent that case to this Court. Specifically, Reed, a borrower, brought a federal court action against the lender, the Commercial State Bank of El Campo to recover on causes of action arising out of loan transaction. The district court dismissed Reed's case with prejudice under FRCP 37(B)(2)(c) for failure of Reed to comply with discovery orders. This dismissal with prejudice was not appealed. Almost seven month later, Reed filed a second complaint against the same defendant in state court, alleging almost identical facts as the complaint

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previously filed in federal court. On appeal, Reed raised issues that the court found to be frivolous and without merit. For example, Reed filed an appellate brief consisting of 88 pages on an issue that was never raised before the district court. Additionally, Reed raised the issues that the dismissal from the first case was not a final judgment on the merits when in fact, the dismissal was with prejudice. Additionally, Reed argued that the Federal Rules of Civil Procedure are unconstitutional where the court found that argument absolutely frivolous. The court found that Reed's attorneys attacks were on a proper final judgment entered with prejudice.

In the case presently before this Honorable Court, the creditors of MTMS claim against the Respondents herein is independent and distinct from MTMS's claim and does not belong and was not part of MTMS's plan of reorganization. As 11 U.S.C §1121(A)(B) provides, only the debtor may file a plan of reorganization. It was only MTMS that filed a plan of reorganization, not the creditors. The creditors were not seeking to reorganize MTMS's business and were thus not provided for in MTMS's plan of reorganization. Additionally, Respondents never raised as an affirmative defense that the creditors are not parties in interest, let alone parties to this lawsuit. Pursuant to FRCP 12(H), this defense is waived. Additionally, the courts have acknowledged the creditors of MTMS as parties to these proceedings since they continue to send notice and other court documents to Lawrence J. Stockler the attorney for the creditors of MTMS.

Additionally, the Honorable George LaPlata of the United States District Court, Eastern District of Michigan, wrote an opinion predicated upon a bankruptcy appeal arising out of Allard and Fish's

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displeasure with an award of attorney fees stated in his "Order Vacating Attorney Fee Award and Remanding Action to Bankruptcy Court," that Respondents herein had a duty to the creditors separate and distinct from their duties to the trustee. Accordingly, this suit was brought on behalf of the creditors. The creditors of MTMS are seeking to have their legal malpractice claim heard against respondents herein(R.1). The Court of Appeal's action of unilaterally consolidating two separate appeals resulted in the denial of allowing the creditors of MTMS the opportunity to appeal, or maintain a malpractice claim against the attorneys for the trustees for MTMS. Respondents duties to the creditors of MTMS are separate and distinct from their attorneys duties to the trustee and that duty was violated by never notifying the creditors nor the creditors committee of the conflict of interest between Bohl and Comerica Bank as well as failing to advise Bohl of his obligation as trustee as was found by bankruptcy Judge Steven W. Rhodes as detailed in Petitioners Writ of Certiorari.

5. In answer to paragraph five (5), Petitioners vehemently deny that Petitioners misrepresented anything on appeal. As a matter of fact, Respondents Brief in Opposition not only intentionally contained errors and omissions but further consisted of misrepresentations and inaccuracies requiring Petitioners to file a reply. As the records, pleadings and transcripts of this matter illustrates, Respondents continue to fabricate and twist the "facts" so as to not give this Honorable Court a fair presentation of this case.

6. In answer to paragraph six (6), Petitioners can neither admit nor deny that a Petition for Writ of Certiorari was filed on behalf of Micro Time Management Systems, Inc. and Otis Kirkland. If this is

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true, that the only parties represented therein are MTMS and Kirkland. Specifically, attached hereto as Exhibit A is a letter dated April 15, 1992 from attorney Lynn Shector stating that she did not represent the creditors on appeal but merely MTMS and Otis Kirkland, only. Additionally, the creditors of MTMS's claim against the Respondents herein is separate, independent and distinct from MTMS's claim and does not belong and was not part of MTMS's plan of reorganization. This action is brought on behalf of the creditors. Lawrence J. Stockler is a creditor, is a member of the creditors committee, is the attorney of record with the creditors approval. Stockler sent out notices to all of the creditors regarding representations in the Allard & Fish lawsuit (R.54), and had affirmative responses back from creditors. Attached hereto as Exhibit B is an order appointing unsecured creditors committee entered by the Honorable Steven W. Rhodes on March 16, 1988 listing those that have consented to be members of the unsecured creditors committee. As a result, the creditors of MTMS have the right to pick their own attorney which had nothing to do with Otis Kirkland or MTMS.

7. In answer to paragraph seven (7), Petitioners deny that its Writ of Certiorari was filed "purportedly" but in fact, this Petition for Writ of Certiorari (92-1810) was filed for the creditors of Micro Time Management Systems, Inc. Indeed, the creditors are parties to this action and in fact, the creditors of MTMS's claim against the Respondents herein is separate and distinct from MTMS's claim and does not belong and was not part of MTMS's plan of reorganization. As 11 U.S.C. §1121 (A)(b) provides, only the debtor may file a plan of reorganization. It was only MTMS who filed a plan

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of reorganization, not the creditors. The creditors were not seeking to reorganize MTMS's business and were thus not provided for in MTMS's plan of reorganization. Accordingly, this suit was brought on behalf of the creditors.

Additionally, the Honorable George LaPlata of the United States District Court, Eastern District of Michigan, wrote an opinion predicated upon a bankruptcy appeal arising out of Allard & Fish's displeasure with an award of attorney fees sated in his "Order Vacating Attorney Fees Award and Remanding Action to Bankruptcy Court" that Respondents herein had a duty to the creditors separate and distinct from their duties to the trustee. Accordingly, as previously stated, this suit was brought on behalf of the creditors.

8. In answer to paragraph eight (8), Petitioners deny that its appeal to the Sixth Circuit Court of Appeals was "purportedly" on behalf of the creditors but in fact WAS for the creditors.

9. In answer to paragraph nine (9), Petitioners vehemently deny as untrue that the creditors, including Stockler, are not now and never have been plaintiffs in this action. As previously stated, attached hereto as Exhibit A is a letter dated April 5, 1992 from attorney Lynn Shector stating that she did not represent the creditors on appeal, merely MTMS and Otis Kirkland only. Additionally, the creditors of MTMS's claim against the Respondents herein is independent and distinct from MTMS's claim and does not belong and was not part of MTMS's plan of reorganization. As 11 U.S.C. §1121(A)(b) provides, only the debtor may file a plan of reorganization. It was only MTMS that filed a plan of reorganization, not the creditors. Additionally, Respondents never raised as an affirmative defense that the creditors are not parties in

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interest, let alone parties to this lawsuit. Pursuant to Federal Rule of Civil Procedure 12(H), this defense is waived. Furthermore, the entitlement acknowledges the creditors of MTMS as a party to these proceedings. The court have acknowledged the creditors of MTMS as party to these proceedings since they continue to send notice and other court documents to the creditors of MTMS.

Additionally, the Honorable George LaPlata of the United States District Court, Eastern District of Michigan, wrote an opinion predicated upon a bankruptcy appeal arising out of Allard and Fish's displeasure with an award of attorney fees stated in his "Order Vacating Attorney fee Award and Remanding Action to Bankruptcy Court," that Respondents herein had a duty to the creditors separate and distinct from their duties to the trustee. Accordingly, this suit was brought on behalf of the creditors.

As previously indicated by Petitioners Writ of Certiorari, attorney Lawrence J. Stockler only withdrew from presenting MTMS and Kirkland, individually, the order submitted with the Motion to Withdraw expressly states that "It is hereby further ordered that Lawrence J. Stockler shall continue to represent the creditors of the estate of Micro Time Management Systems, Inc." (R.48, pages 11-12). No objections whatsoever were ever filed by Respondents to that motion or to the submitted order. No court ever ruled upon dismissing the pleadings filed by the creditors, except the Court of Appeals. Stockler is a creditor, is a member of the creditors committee and is the attorney for the creditors in this matter. An attorney who appears for a party in pending litigation is always presumed to have authority to do so until the contrary is shown.

0090B

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Stockler sent out notices to all of the creditors regarding representation in the Allard & Fish lawsuit (R.54), and had affirmative responses back from creditors. Attached hereto as Exhibit B is an order appointing unsecured creditors committee entered by the Honorable Steven W. Rhodes on March 16, 1988 listing those that have consented to be member of the unsecured creditors committee. As a result, the creditors of MTMS had the right to pick their own attorney which had nothing to do with Otis Kirkland or MTMS.

Additionally, the creditors through their attorney Stockler always continued to receive documents, notices and pleadings from the court, and Petitioners continued to file pleadings and other documentations with the courts, contrary to Respondents position. Additionally, not only was a class action not required pursuant to FRCP 23, but further, Respondents raise this issue for the first time on appeal.

10. In answer to paragraph ten (10), Petitioner denies completely as untrue. In further answer, the creditors of MTMS's claim against the Respondents herein is independent of MTMS's claim and does not and would not belong in MTMS's plan of reorganization. The creditors of MTMS are seeking to have their legal malpractice claim heard against Respondents herein. (R.1) The Court of Appeal's action of unilaterally consolidating two separate appeals resulted in the denial of allowing the creditors of MTMS the opportunity to appeal, or maintain a malpractice claim against the attorneys for the trustee for MTMS. Respondents duty to the creditors of MTMS are separate and distinct from their attorneys duties to the trustee and that duty was violated by never notifying the creditors nor the creditors committee of the conflict of interest between Bohl and Comerica Bank as well as failing

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to advise Bohl of his obligation as trustee as was found by Bankruptcy Judge Steven W. Rhodes as detailed in Petitioner's Writ of Certiorari.

11. In answer to paragraph eleven (11), Petitioner denies as untrue, Respondent obviously ignoring Petitioner's Writ of Certiorari as well as its Reply to Respondents Brief in Opposition. Specifically, this motion as well as Respondents Brief in Opposition intentionally contains errors and omissions and further consists of misrepresentations and inaccuracies with a twisting of "facts" so as to not give this Honorable Court a fair presentation of this case.

12. In answer to paragraph twelve (12), Petitioners object as to what costs, expenses or attorney fees Respondents have incurred as irrelevant and would advise the Respondents as a result of the legal malpractice by the Respondents herein, the creditors losses amounted to several millions of dollars. Additionally, Petitioner objects to references as to "phantom creditors" as the same being untrue and just another misrepresentation and inaccuracy by the Respondents to this court -- these creditors filed claims of several million dollars in Bankruptcy which were approved.

13. In answer to paragraph thirteen (13), Petitioner denies as untrue for the reasons set forth herein as well as the cases that Respondents are relying on (Engra, supra and Warner Brothers, supra,) which have been previously detailed herein, are not applicable to the case presently before this court.

14. In answer to paragraph fourteen (14), Petitioner vehemently denies as untrue and would assert to this Court that the creditors of MTMS's claim against the Respondents herein is independent and distinct

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from MTMS's claim and the creditors of MTMS are entitled to their day in court.

15. In answer to paragraph fifteen (15), Petitioner denies as untrue that there were any misrepresentations by Petitioners to this court. In further answer, Respondents once again assert that certain documents or transcripts were never part of the record below. In actuality, the same is part of the joint appendix filed in this matter. For example, the August 14, 1990 transcript that Respondents refer to are a part of the joint appendix as R.6.

16. In answer to paragraph sixteen (16), Petitioners deny the allegations as set forth and rely on its Writ of Certiorari as well as Reply to Respondents Brief in Opposition as previously filed with this court. As the records, pleadings and transcripts of this matter illustrates, Respondents continue to fabricate and twist the "facts" so as to not give this Honorable Court a fair presentation of this case. Additionally, Respondents asserts that Stockler references and quotes R.67 in its brief. However, Petitioners do not rely or identify or utilize R.67. Accordingly, once again, Respondents continue to fabricate and twist the "facts" as to not give this Honorable Court a fair representation of this case. Additionally, Respondents refer to pages 10, 24-25 and 39-40 of Petitioners Brief, asserting that Petitioner is referencing and quoting a September 16, 1991 opinion. Any reference to any opinion in this matter is substantiated by the records pleadings and transcripts as part of the joint appendix.

17. In answer to paragraph seventeen (17), any reference to the December 17, 1990 bankruptcy court hearing was to clarify Respondents misrepresentations as to the creditors not having any standing.

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Specifically, as to the Motion to Reopen the Bankruptcy case on November 154, 1990, the motion was denied by the bankruptcy court BECAUSE THE BANKRUPTCY COURT FOUND THAT IT WAS NOT NECESSARY TO REOPEN THE CASE SINCE THE CASE WAS NEVER CLOSED. THERE WAS NO FINDING WHATSOEVER THAT THE UNSECURED CREDITORS COMMITTEE HAD NOT STANDING TO PURSUE AN ACTION FOR LEGAL MALPRACTICE. More specifically, the Court of Appeals for the Sixth Circuit's finding that Stockler's Motion to Reopen the Bankruptcy Case to pursue a cause of action against Allard & Fish for alleged legal malpractice was incomplete. Specifically, the creditors, through Lawrence J. Stockler as a creditors, a member of the creditors committee, moved to reopen the Chapter 11 proceedings in order to file a lawsuit against Allard and Fish, P.C., David W. Allard and Deborah L. Fish, whereby the Honorable Steven W. Rhodes heard the motion and determined that it was not necessary to open the proceedings in order for such a lawsuit to be filed since the bankruptcy case was never closed.

18. In answer to paragraph eighteen (18), Petitioners deny as untrue that there was any misleading or misrepresentation to this court by Petitioners herein. As previously stated and reiterated within Petitioners Writ of Certiorari as well as its Reply to Respondents Brief in Opposition, the constitutional provisions involved as provided for were presented at the Sixth Circuit Court of Appeals and are properly before this court. As a result of the Court of Appeals for the Sixth Circuit unilaterally consolidating as one appeal case 91-2260 and 91-2261, the Court of Appeals for the Sixth Circuit has violated the creditors due process of law whereby the creditors are left without counsel, without a remedy, without this appeal, without due process and

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equal protection of law. Petitioners other arguments are properly before this court where the relief sought should be granted by this Honorable Court and this matter should be ruled upon by this Court in holding that the unsecured creditors, pursuant to due process of law, are entitled to representation by their own attorney on their own appeal as well as maintain a malpractice claim against the attorneys for the trustee even when there are no provisions provided for in the plan of reorganization.

More importantly, Petitioners vehemently deny of any preconfirmation knowledge of any conflict of interest until the hearing before the Honorable Steven W. Rhodes on August 14, 1990. Additionally, it is obvious that Respondents intentionally misrepresent the records, pleadings and transcripts of this matter and fabricate and twist the "facts" so as to not give this Court a fair presentation of this case. Petitioner further objects to Respondents reference of "non party appeal" and relies completely on its Writ of Certiorari as well as its Reply to Respondents Brief in Opposition.

19. In answer to paragraph nineteen (19), Petitioners deny as untrue, Petitioners Writ of Certiorari being far from frivolous or vexatious. These Creditors lost several millions of dollars that were not protected in bankruptcy as a result of legal malpractice.

20. In answer to paragraph twenty (20), no answer is necessary since Respondents Brief in Opposition intentionally contains errors and omission and further consists of misrepresentations and inaccuracies that required Petitioners to file a reply as the records, pleadings and transcripts of this matter illustrates, respondents continue to

fabricate and twist the "facts" so as to not give this Honorable Court a fair presentation of this case.

RELIEF REQUESTED

WHEREFORE, Petitioners, the Creditors of Micro Time Management Systems, Inc., by and through their attorneys, Law Offices of Lawrence J. Stockler & Associates, P.C. respectfully requests this Honorable Court to deny Respondents motion for damages and further requests this court to hold that the unsecured creditors pursuant to due process of law, are entitled to representation by their own attorney on their own appeal as well as maintaining malpractice claim against the attorneys for the trustee even when there are no provisions provided for in the plan of reorganization. In the alternative, this matter should be remanded to the United District Court for the Eastern District of Michigan to Reinstate Petitioners Complaint and have the trier of fact rule on questions of fact and to award petitioners such further relief this court deems just and appropriate.

Respectfully submitted,

LAWRENCE J. STOCKLER & ASSOCIATES, P.C.

BY: _____

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Supreme Court, U.S.
FILED
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No. 92-1810

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1992

CREDITORS OF MICRO-TIME MANAGEMENT SYSTEMS, INC.,
Petitioners,

v.

ALLARD & FISH, P.C., a Michigan professional corporation; DAVID W. ALLARD, JR.; DEBORAH L. FISH,
Jointly and Severally,
Respondents

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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* Counsel of Record for Petitioner, Creditors of Micro-Time Management Systems, Inc.

BEST AVAILABLE COPY

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REPLY TO COUNTER STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER THE CREDITORS ARE PARTIES TO THIS ACTION AND WHETHER STOCKLER REPRESENTS THEM OR HAS STANDING TO PURSUE A PETITION ON THEIR BEHALF?

II.

WHETHER THE CONSTITUTIONAL ISSUES PRESENTED TO THIS COURT ARE PROPERLY BEFORE THIS COURT?

III.

WHETHER THIS PETITION SHOULD BE GRANTED WHEN PETITIONER ILLUSTRATES REASON JUSTIFYING A WRIT OF CERTIORARI?

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FEDERAL LAW

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OPINIONS BELOW

Petitioners rely on its previously submitted opinions as detailed therein. Respondents' "dissatisfaction" is irrelevant, illogical and has no merit since all of the opinions as detailed in Petitioner's Writ of Certiorari were not only addressed on appeal, but further, part of the joint appendix filed in this matter. (For example, see Joint Appendix, R.41, pages 50 to 67 -- for Memorandum Opinion and Order entered in the Chapter 11 bankruptcy proceeding relative to Micro-Time Management Systems, Inc. by the United States District Court Eastern District of Michigan, Bankrupcty Court, attached to Petitioners Writ of Certiorari as Appendix C.) Accordingly, Respondents allegation that the memorandum opinion and order from the Honorable Steven Rhodes of the United States District Court Eastern District of Michigan, Bankruptcy

Court was never a subject of this appeal is erroneous.

STATEMENT OF JURISDICTION

Since Respondent does not address Statement of Jurisdiction section within Petitioner's Writ of Certiorari, no reply is necessary or required.

CONSTITUTIONAL PROVISIONS INVOLVED

Once again, Respondents assert that they are "dissatisfied" with the presentation of the constitutional provisions involved as set forth in Petitioner's Writ of Certiorari. However, the constitutional provisions involved as provided for in Petitioner's Writ of Certiorari were presented to the Sixth Circuit Court of Appeals and are properly before this court. Additionally, as a result of the Court of Appeals for the Sixth Circuit unilaterally consolidating as one appeal cases 91-2260 and 91-2261, the Court of Appeals for the Sixth Circuit has violated the creditors due process of law whereby the creditors are left without counsel, without a remedy, and without this appeal without due process and equal protection of law.

I.
REPLY TO COUNTER STATEMENT OF THE CASE

Respondents' counter-statement of the case not only intentionally contains errors and omissions but further consists of misrepresentations and inaccuracies, forcing this reply. Pursuant to the Respondents, that they are the only ones who know all of the "facts". However, as the records, pleadings and transcripts of this matter illustrates, Respondents continue to fabricate and twist the "facts" so as to not give this Honorable Court a fair presentation of this case.[1]

Respondents assert that the Creditors of Micro Time Management Systems, Inc. (hereinafter "MTMS") are not now, and have never been parties to this "independent

[1] For example, Respondents state in their brief that "Stockler then attempted to file a late motion for reconsideration (R47) which was denied..."[p.8 - Respondent's Brief]. In actuality, (R.47) is an Exparte Motion to extend time to file a Motion for Reconsideration. Petitioners never filed a Motion for Reconsideration except before the Court of Appeals for the Sixth Circuit.

adversary proceeding". Additionally, Respondents assert that MTMS and Otis Kirkland are pursuing their own Writ of Certiorari on behalf of all other creditors.

However, this is not true. Attached hereto as Appendix A is a letter dated April 15, 1992 from Lynn Shector stating that she did not represent the creditors but merely MTMS and Otis Kirkland only.

Additionally, the creditors of MTMS' claim against the respondents herein is independent and distinct from MTMS' claim and does not belong and was not part of MTMS' plan of reorganization. As 11 U.S.C. §1121(A)(B) provides, only the debtor may file a plan of reorganization. It was only MTMS that filed a plan of reorganization, not the creditors. The creditors were not seeking to reorganize MTMS' business and

were thus not provided for in MTMS' plan of reorganization.[2]

Additionally, the Honorable George LaPlata of the United States District Court, Eastern District of Michigan, wrote an opinion predicated upon a bankruptcy appeal arising out of Allard & Fish's displeasure with an award of attorney fees stated in his "Order Vacating Attorney Fee Award and Remanding Action to Bankruptcy Court," that Respondents herein had a duty to the creditors separate and distinct from their duties to the trustee. Accordingly, this suit was brought on behalf of the creditors.

As previously indicated by Petitioner's Writ of Certiorari, attorney Lawrence J.

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[2] Respondents never raised as an affirmative defense that the creditors are not parties in interest, let along parties to this lawsuit. Pursuant to FRCP 12(h), this defense is waived. Furthermore, the entitlement acknowledges the Creditors of MTMS as a party to these proceedings. The courts have acknowledged the Creditors of MTMS as parties to these proceedings since they continue to send notice and other court documents to the Creditors of MTMS.

Stockler only withdrew from presenting MTMS and Kirkland, individually. The order submitted with the motion to withdraw expressly states that "It is hereby further ordered that Lawrence J. Stockler shall continue to represent the creditors of the estate of Micro Time Management Systems, Inc." (R. 48, p. 11-12). No objections were ever filed by Respondents to that motion or to the submitted order. No court ever ruled upon dismissing the pleadings filed by the Creditors, except the Court of Appeals. Stockler is a creditor, is a member of the creditors committee and is the attorney for the creditors in this matter. An attorney who appears for a party in pending litigation is always presumed to have authority to do so until the contrary is shown. See Drew v Burley, 287 F 916 (DC Or. 1920). There is a presumption that an attorney is authorized to appear and the

burden rests on the party on whose proported behalf the attorney appeared to show to the satisfaction of the court that no authority existed. See Aaron v United States, 155 F 833 (CA Mo. 1907). The Creditors of MTMS are parties to this proceeding and are entitled to their day in court.

Respondents next assert that Petitioner concedes all the relevant facts as set forth in the Court of Appeal's Opinion. HOWEVER, THIS IS NOT TRUE.

For example, the Court of Appeal's finding that Stockler was no longer representing any plaintiff or appellant in the case (Court's Opinion, Petitioner's Writ of Certiorari, Appendix B, page 2, footnote 1) is clearly erroneous. Lawrence J. Stockler is a creditor, is a member of the creditors committee, is the attorney with the creditors' approval. Stockler sent out notices to all of the creditors regarding

representation in the Allard & Fish lawsuit (R.54), and had affirmative responses back from creditors. Attached hereto as Appendix B is an order appointing unsecured creditors committee entered by the Honorable Steven W. Rhodes on March 16, 1988 listing those that have consented to be members of the unsecured creditors committee. As a result, the creditors of MTMS have the right to pick their own attorney which has nothing to do with Otis Kirkland or MTMS.

Additionally, the Court of Appeal's finding that attorney Arnold Schafer, previous attorney for MTMS, told Bohl that the relationship between Bohl and Comerica did not represent a conflict of interest is untrue, the same being determined by a jury ruling in favor of MTMS and against Bohl in the lawsuit United States of America for the use of Otis Kirkland and Micro Time Management Systems, Inc. v Fidelity and

Deposit Company of Maryland, Case No. 89-0600-R (R.1, P. 25-26). Additionally, the lower court's finding that Bohl did not discuss the issue of a conflict with Comerica with Respondents herein was erroneous, Bohl giving two separate stories at trial.

The lower court's finding that at the October 11, 1988 hearing in bankruptcy court before Judge Steven Rhodes that the court handed out copies of the Kirkland letter dated October 6, 1988 to all parties is an error. Specifically, there never was an attorney for the creditors committee present as there was NEVER any attorney for the Creditor's Committee. This was to keep costs down. Those that were present were only Comerica's counsel, Allard & Fish, and Schafer & Weiner (MTMS's attorney). Neither Stockler, Joseph Toronto, David Riccitelli, or John Cafiero, were present (Appendix B).

At the very least, who had knowledge of the conflict between Bohl & Comerica would be a question of fact for a jury to make the determination thereof, or even an advisory jury pursuant to FRCP 39(c). Additionally, the attorney for Roaring Springs was not the attorney for the creditors committee nor a member of the creditors committee nor present at the settlement conference of October 11, 1988. Even if he was, this was not notice to the creditors. The unsecured creditors committee had no knowledge whatsoever of the conflict between Bohl and Comerica until the trial against Bohl when Allard & Fish both testified (July, 1990).

Furthermore, what information or notice Kirkland may have had, the creditors and the creditors committee did not have such information, and so the creditors were hardly in a position to make a claim before they knew of the trustees conflict of

interest, before Judge Rhodes held on August 14, 1990 that Allard & Fish had breached their duties. (R.6, p. 27-35) In particular, Respondents breached their duties to the estate and to the creditors by failing to investigate the conflict and failing to review with Bohl as trustee, in a concrete and real and substantial way, Mr. Bohl's duties as a Chapter 11 trustee.

Respondents continue to assert that "the creditors" of MTMS have never been parties to this action either individually or collectively.[3]

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[3] In Respondent's Brief, page 6, Respondent state that "neither Stockler, any party to this action, nor the Court, ever took any steps to actually include any creditor as a party to this action. Otis Kirkland was the principal of the debtor, its sole shareholder and subordinated creditor with a status equivalent to an equity holder to be paid dividends only if all other creditors were paid in full. No class action procedure, or any other procedure was implemented to include any individual creditor to group or class of creditors." However, the creditors through their attorney Stockler always continued to receive documents, notice and pleadings from the courts, and Petitioners continued to file pleadings and other documentations with the courts, contrary to Respondents position. Additionally, not only was a class action not required pursuant to FRCP 23, but

However, respondents argument and allegations are untrue and are not consistent with the record and documents that have been filed in these proceedings. This action was commenced by the creditors, through Stockler, as a creditor and a member of the creditors committee, on January 8, 1991 against Allard & Fish in the United Stated Bankruptcy Court for the Eastern District of Michigan (R.1) (which was removed to the United District Court for the Eastern District of Michigan) as a result of the legal malpractice by the Respondent's herein. THE CREDITORS LOSSES AMOUNTING TO SEVERAL MILLIONS OF DOLLARS. MTMS and Otis Kirkland, asked to be included as plaintiffs in this lawsuit. Stockler, as a creditor, agreed but made it clear in the complaint that was filed on January 8, 1991 that the

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further, Respondents raise this issue for the first time on appeal.

damages of the creditors and the debtor were separate from one another. SPECIFICALLY, THE RELIEF CLAUSE OF THE COMPLAINT REQUESTS "THAT THIS COURT APPORTION SUCH RELIEF GRANTED BETWEEN THE DEBTOR AND ALL OF THE CREDITORS." (R.1, p. 13-14). Kirkland signed the complaint twice, once as president of MTMS and once individually "and on behalf of all other creditors." On or about April 3, 1991, the creditor's attorney Stockler moved to withdraw as to MTMS and Kirkland only. (R. 14) The motion was granted by Judge LaPlata on May 23, 1991. Although Stockler was no longer Kirkland or MTMS's counsel, Stockler was still a member of the creditors of MTMS as detailed in appeal No. 91-2260, as well as the attorney for the creditors of MTMS. (R. 54)

Moreover, as previously indicated in Petitioner's Writ, pertaining to Stockler's motion to reopen the bankruptcy case on

November 14, 1990, the Bankruptcy Court found that it was not necessary to reopen the case **SINCE THE CASE WAS NEVER CLOSED. THERE WAS NO FINDING WHATSOEVER THE UNSECURED CREDITORS HAD NO STANDING TO PURSUE AN ACTION FOR LEGAL MALPRACTICE.**

Additionally, Petitioner would refer Respondents to Notice of Taking Appeal filed October 25, 1991 (R.54) where a Notice of Taking Appeal was filed by the creditors of MTMS.

II.
INACCURACIES IN RESPONDENT'S BRIEF

Respondents Brief addresses three issues, alleging that Petitioner's Writ of Certiorari fails to meet certain "thresholds". The issues are:

a. Whether Stockler and/or "the creditors" have standing in this lawsuit;

b. Whether the constitutional issues raised are properly before this court; and

c. Whether Petitioner's Writ of Certiorari presents issues which would justify granting Petitioner's Writ of Certiorari.

Respondents conveniently ignore the issues raised and addressed from Petitioner's Writ and derive their own.

III.
STOCKLER & THE CREDITORS OF MTMS DO HAVE STANDING

The Creditor's of MTMS's claim against the Respondents herein is independent of MTMS's claim and does not and would not belong in MTMS's plan of reorganization. Additionally, in Judge LaPlata's "Order Vacating Attorney Fee Award and Remanding Action to Bankruptcy Court", Judge LaPlata held that the Respondents herein have a duty to the creditors of MTMS separate and distinct from their duties to the trustee.[4]

[4] Specifically, Judge LaPlata stated in his opinion of September 16, 1991 that: "...the Bankruptcy Trustee has a general fiduciary duty to all parties in interest in the bankruptcy case. This duty extends to the shareholders and the creditors. [See, Commodity Futures Trading Commission v Weintraub, 105 S. Ct. 1986 (1985)]...[I]n the bankruptcy arena, counsel for the trustee is a fiduciary of the estate [See, In Re:

Accordingly, Stockler and the creditors of MTMS do have standing to file this Writ of Certiorari.

IV.
THE CONSTITUTIONAL ISSUES RAISED ARE PROPERLY BEFORE THIS COURT

In regards to Respondents assertions of omissions from Petitioner's Writ in relation to constitutional issues, this is erroneous. The Court of Appeals unilaterally consolidated two separately filed and independent appeals, being the creditors claim against the Respondents and MTMS's claim against the Respondents. The Court of Appeals Opinion merging both appeals

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Consupak, Inc., 87 B.R. 529 (Bkrtcy. N.D. Ill. 1988]..." The facts establish that the creditors of MTMS, as a matter of law, had their own attorney and their own standing to appeal, as a matter of right, the trial court's dismissal of the creditors complaint. (R.54) Specifically, even if arguendo the trial court rules that MTMS and Kirkland had notice and knowledge of the facts of malpractice, that should have been included in MTMS's plan of reorganization, this did not dispose of the creditors of MTMS claim because the creditors nor the creditor's committee had any knowledge of either MTMS's chapter 11 disclosure for reorganization of the malpractice and wrongful actions of defendants. (R. 1)

together denied the creditors a right to appeal (a denial of due process and equal protection of the law).[5] As detailed in Petitioner's Writ (Issue II, page 30), due process of law mandates that creditors to a bankruptcy proceedings are entitled to representation by an attorney of their own on appeal. Tis issue was addressed and ignored with the Court of Appeals. After the trial court's granting of summary judgment, Stockler, as a creditor, on behalf of the creditors and the attorney for the

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[5] The Fifth Amendment to the U.S. Constitution states "No person shall be...deprived of life, liberty or property without due process of law." The Court of Appeals denied the Creditors due process and equal protection of the law by leaving the Creditors of MTMS without a remedy, without any representation, or an appeal.

See Bloom v State of Ill., 391 U.S. 194, 88 S. Ct. 1477, 20 L.Ed.2d 522 (Ill. 1968); Galvan v Press, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911 (Cal.1954). Mathews v Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (Va. 1976); Orloff v. Cleland, 708 F.2d 372 (C.A. Cal. 1983). Armstrong v Manzo, 380 U.S. 545, 552; 85 S. Ct. 1187; 914 L.Ed.2d. 62 (1965); Kanisley v Monroe, 539 F. Supp. 849 (1982); The standard for determining whether a person has been afforded procedural due process is whether he has been treated with fundamental fairness in light of the toral circumstances. Davis v Ann Arbor Public Schools, 313 F.Supp. 1217 (1870).

creditors in this matter, filed notices, specified the parties, specified the issues, filed the creditors appeal with designation of counsel of record, and paid all fees pursuant to the Federal Rules of Appellate Procedure.

MTMS and Kirkland (Co-plaintiffs) filed their own appeal through their own counsel. The creditors are entitled to representation on appeal by their own attorney, Stockler. The creditors briefs as well as their own oral argument should have been treated separately by the Court of Appeals to entitle the creditors equal protection and due process of law. The Court of Appeals precluded the creditors from any representation, ignored creditor's brief and ignored the creditors as if they didn't exist, when it is the creditors which suffered several million dollars of damages due to Respondent's malpractice.

V.
PETITIONER'S WRIT OF CERTIORARI PRESENTS ISSUES THAT JUSTIFY GRANTING PETITIONER'S WRIT

Respondents third allegation is that the creditor's Petition does not present issues which would justify a Writ of Certiorari. This is without merit.

First, the creditors of MTMS are seeking to have their legal malpractice claim heard against Respondents herein. (R.1) The Court of Appeal's action of unilaterally consolidating two separate appeals resulted in the denial of allowing the creditors of MTMS the opportunity to appeal, or maintain a malpractice claim against the attorneys for the trustees for MTMS. Respondents duty to the creditors of MTMS are separate and distinct from their attorneys duties to the trustee and that duty was violated by never notifying the creditors nor the creditors committee of the

conflict of interest between Bohl and Comerica bank as well as failing to advise Bohl of his obligation as trustee as was found by Bankruptcy Judge Steven W. Rhodes as detailed in Ptitioners Writ (page 13 footnote 1).

The Court of Appeals actions has resulted in the denial of allowing the creditors of MTMS the opportunity to appeal. A Notice of Taking Appeal was filed by Stockler, attorney for all creditors of MTMS other than Otis Kirkland. (R.54) MTMS and Otis Kirkland by and through their attorney, Kenneth M. Graham, filed their own notice of taking appeal. Graham never represented the creditors or Stockler at any time. Additionally, Graham was advised by Stockler both verbally and in writing that Graham does not represent the creditors of MTMS or Stockler. It was obvious that Kirkland knew of the conflict between Bohl and Comerica as

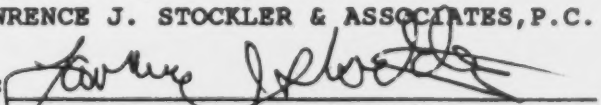
clearly indicated by his October 6, 1988 letter to the bankruptcy court. However, this does not mean and in fact does not mean that Stockler nor any of the creditors of MTMS knew of the conflict between Bohl and Comerica. Appeal No. 91-2260 was the appeal pertaining to the creditors of MTMS who had no knowledge of the conflict between Bohl and Comerica until the hearing before Judge Steven W. Rhodes on August 14, 1990. Appeal No. 91-2261 consisted of MTMS and Otis Kirkland. A joinder of both appeals by the Court of Appeals was not practical since that court denied the creditors of MTMS the opportunity to appeal the lower court's opinion. Accordingly, respondents assertions that this court should deny petitioner's Writ of Certiorari is without merit.

RELIEF REQUESTED

As indicated in Petitioner's Writ of Certiorari, the relief sought should be

granted by this Honorable Court and this matter should be ruled upon by this court in holding that the unsecured creditors pursuant to due process of law, are entitled to representation by their own attorney on their own appeal as well as maintain a malpractice claim against the attorneys for the trustee even when there are no provisions provided for in the plan of reorganization. In the alternative, this matter should be remanded to the United District Court for the Eastern District of Michigan to reinstate Petitioner's complaint and have the trier of fact rule on questions of fact.

Respectfully submitted,
LAWRENCE J. STOCKLER & ASSOCIATES,P.C.

BY: 

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Dated: July 14, 1993

APPENDIX A

ROY, SHECTER & VOCHT, P.C.
Attorneys and Counselors
877 South Adams, Suite 302
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William A. Roy
Lynn H. Shecter
Michelle E. Vocht

Facsimile
(313) 540-0321

April 15, 1992

VIA FACSIMILE 569-0631

Lawrence J. Stockler, Esq.
15565 Northland Dr. Ste. 500
Southfield, Michigan 48075

Re: Micro-Time Management Systems, Inc.
v Allard & Fish, P.C., et al
Case No: 91-2261 District Court
Case No: 91-CV 60025

Dear Mr. Stockler:

You have asked me to clarify who my law firm represents in the appeal of Micro-Time vs Allard & Fish, P.C.

We represent Micro-Time Management Systems, Inc. and Otis Kirkland, only.

Very truly yours,

ROY, SHECTER & VOCHT, P.C.

/s/

Lynn H. Shecter

LHS/rp

APPENDIX B

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

In the matter of:

DATE: 18 MAR 1988

Micro-Time Management
Systems, Inc.

Case No. 88-01181-R

Debtor

_____/

ORDER APPOINTING UNSECURED
CREDITORS' COMMITTEE

At a session of said Court, held in the United States Courthouse, in the City of Detroit, Michigan, on March 16, 1988

PRESENT: HONORABLE Steven W. Rhodes
U.S. Bankruptcy Judge

The following unsecured creditors having consented to serve as members of the unsecured creditors' committee:

Chairperson
Roaring Spring Blank Book Company
David M. Riccitelli, VP Director of Administration
740 Spang Street
Roaring Spring, PA 16673
(814) 224-5141

Toronto Business Equipment
Joseph Toronto
1159 W. Broad Street
Columbus, Ohio 43222
(614) 272-5500

Esselte Pendaflex Corporation
John Cafiero
71 Clinton Road
Garden City, NY 11530
(516) 741-3200

Stockler & Herbach, P.C.
Lawrence J. Stockler
500 Northland Towers East
15565 Northland Drive
Southfield, MI 48075
(313) 7700

NOW THEREFORE, pursuant to Section 1102 of the Bankruptcy Code,

IT IS HEREBY ORDERED that they be, and hereby are appointed members of the unsecured creditors' committee in the above entitled case.

_____ /S/_____
U.S. Bankruptcy Judge